AGRARIAN REFORM

IN ROUMANIA

and the case of the Hungarian optants

in Transylvania

before the League of Nations

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1927


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FOREWORD

This book comprises a series of opinions on the so-called Hungarian optants question.

This question of the Hungarian optants in Transylvania has its origin in the agrarian reform which, for imperative reasons of social welfare, Roumania was forced to introduce before the Great War.

For some time past, the distribution of rural property in Roumania, essentially an agricultural country, was abnormal. Half the arable land of the country was owned by 4,000 large landowners out of a population of nearly *eight* million inhabitants. The predominating peasant class owned none and were employed as agricultural labourers. This state of affairs constituted a continual menace to social peace. The peasant revolts of 1907 had already brought home to the Roumanian legislators the necessity of remedying such a situation and of introducing an agrarian reform. The object of the reform was therefore of a social as well as of a moral nature.

In May 1914, a Constituent Assembly was elected for the purpose of amending the Roumanian Constitution in such a way as to render the agrarian reform possible. A few months later, the Great War broke out ; in 1916 Roumania was herself engaged in hostilities and nothing could be done regarding the reform until 1917.

At this time, the social and political doctrines of the countries adjoining Roumania were beginning to threaten the very foundation of individual ownership.

The agrarian reform therefore became urgently necessary not only as a remedy to the abnormal distribution of land, but also as a social defence law. It was necessary to consolidate the basic principles of ownership and, in consequence, to make it possible for the overwhelming majority of the population — the peasants — to participate in the preservation of individual ownership.

The Constitution of 1917 resulting from the elections of 1914 came into existence and large estates were expropriated and converted into small holdings which were handed over to the peasants. The Constitution also fixed the compensation to be granted to the dispossessed owners ; this took the form of annuity stock (redeemable in 50 years and bearing 5% interest) the nominal value of which was considered as being equivalent to the cash value of the expropriated property. At this date, the Roumanian currency stood at gold parity.

Once the peasant became his own landlord, the irregular distribution of landed property was adjusted and by reason of the invisible bonds which tie a peasant to his land, the basis of individual ownership was thoroughly consolidated.

This Constitution of 1917 subsequently became law in the new territories annexed to Roumania and, therefore, in Transylvania. On the one hand, there could not reasonably be more than one single Constitution for the whole of the new Roumania. On the other, the distribution of property in the new territories was just as defective and the need for social defence just as imperative.

843,448 small landowners, representing 87.6 % of the total number, with small holdings of from 1 to 20 jugars, possessed only 34% of the agricultural property in the country, whereas 8,439 large landowners, with estates of 100 jugars and upwards, possessed 41.25%, or nearly half, of the agricultural land.

It must be added that the events which took place in Budapest in 1919, when Bela Kuhn took possession of power and organised bolshevism in Hungary, made it indispensable to extend the same reform to these provinces.

In its memorandum submitted to the Peace Conference : "The agrarian reform in Transylvania", the Hungarian Government frankly admits that Transylvania was a centre of bolshevist agitation (1).

The decrees of His Majesty the King published in December 1918 and September 1919 put the agrarian reform into operation, and the laws of 1921 ratified these measures, which were taken without any distinction of nationality and on the principle of absolute equality.

(1) See the publication by the Hungarian Government : « *The Hungarian Peace Negociations.* An account of the work of the Hungarian Peace Delegation from January to March 1920 » Volume I.

The Hungarian peasants in Transylvania benefited by the new distribution of land just as the Roumanian peasants benefited thereby in the former Kingdom, and the landowners in Transylvania and the former Kingdom were subjected alike to the same expropriation.

H. M. the King was the first to set an example and the whole of the arable land belonging to the crown was expropriated.

In order to avoid any appearance of arbitrariness, the price of the expropriated land was calculated by applying coefficients to the rental value.

Since 1917, however, when the national currency stood at gold parity, and since 1918-1919 when the currency was still fairly firm, Roumania, like many other countries has seen the fall of her exchange. Consequently, the compensation granted to the dispossessed owners no longer represented the gold value of their land.

This situation obviously entailed a sacrifice on the part of the owners ; but they realised that it is sometimes necessary to adopt the methods of a ship's captain who jettisons part of his cargo in order to save the remainder, especially when, as in this case, it was a question of preserving social order.

Only one protest was lodged—that of the Hungarian optants ; such is the designation of the landowners in Transylvania who had opted for Hungarian nationality.

On August 16th, 1922, the Hungarian Government lodged a complaint with the Conference of Ambassadors on behalf of the Hungarian optants. It was advised to refer the matter to the League of Nations.

On March 15th, 1923, therefore, the Hungarian Government appealed to the Council of the League of Nations and requested it *to pronounce on the question of substance* by declaring that the Roumanian agrarian laws were contrary to the provisions of the Treaty of Trianon and by ordering that the land formerly belonging to the Hungarian optants should be restored to them and compensation paid.

The two parties having been heard, the discussion of the matter was adjourned to the July session, the two Governments being invited to reach an agreement in the meantime. Under the auspices of Ambassador Adatci, the representative of Japan, the two parties signed an agreement at Brussels on May 26th, 1923, under the terms of which it was recognised that in so far

as concerned the discrepancy between the Roumanian agrarian laws and the Treaty of Trianon *"it is admitted—and the Hungarian representatives do not dispute the point—that the Treaty does not preclude the expropriation of the property of optants for reasons of public welfare, including the social requirements of agrarian reform."*

A draft resolution was accepted and signed by the two parties and it then seemed that the matter was at an end. Hungary, however, disowned her plenipotentiary.

M. Adatci, the rapporteur for this question, in submitting a memorandum to the Hungarian Minister for Foreign Affairs wrote as follows :

"So far from having failed, as the Hungarian communication would suggest, the negotiations which were carried on at great length in Brussels between the distinguished representatives of the Hungarian and Roumanian Governments under the auspices of M. Adatci, have led to certain results which may assist in the solution of the difficulties now pending between the two countries. These results represent certain points on which the delegates of the two Governments have reached an agreement. Accordingly, M. Adatci is surprised to learn from the communication of the Hungarian Government that the latter apparently wishes to cast a doubt on these results. It is obvious that the work of the Council of the League of Nations to maintain good relations between Members who are parties to a dispute would be rendered impossible if, in contravention of all international use, the delegates sent by the Parties and duly authorised by them to negotiate under the auspices of a Member of the Council could subsequently be repudiated by their Governments."

M. Adatci went on to say :

"This, however, is not the central point of the Brussels negotiations. The central point is that, during the conversations which took place directly between them, the representatives of the two Parties, duly authorised for that purpose—in the presence of certain officials of the Secretariat of the League of Nations, whom M. Adatci had requested to be at the disposal of the delegates—arrived by common agreement at certain conclusions on a number of points on which the Hungarian request

was based, this request being in itself the foundation on which the Council forms its views on the matter. These points of agreement are recapitulated in a report which has been formally approved by the representatives of both Parties.

"Copies of the report are in the possession of both Parties. There is no need to give a summary of the various points here. In his report to the Council M. Adatci proposes to begin by stating these positive results, which cannot be called in question."

The Council adopted the Brussels resolution and took note of the declarations made by the parties, which constituted positive results which could not again be disputed.

The Hungarian optants themselves recognised the validity of the Roumanian agrarian laws by applying to the Roumanian courts and on the basis of the agrarian law they exhausted the courses of legal procedure ; then followed a motion for revision before the Agrarian Committee. A number of the optants won their case.

But they were not yet satisfied and they returned to the attack.

The matter was, however, no longer submitted to the League of Nations or to the Roumanian courts ; in December 1926, the Hungarian optants laid their case before the Roumano-Hungarian Mixed Arbitral Tribunal set up in virtue of Article 239 of the Treaty of Trianon. The jurisdiction of this Tribunal is strictly limited to questions relating to the liquidation of ex-enemy property. The optants now claimed that the Roumanian agrarian reform, which the Hungarian Government regarded as compatible with the Treaties and which the Hungarian optants themselves, in their pleadings before the Roumanian courts, agreed was a measure of expropriation for reasons of public welfare, was war liquidation and therefore contrary to Article 250 of the Treaty of Trianon ; they consequently demanded—ten years after the law had been introduced—that their land should be restored to them or that compensation equivalent to its gold value be paid to them. It was in this way that the agrarian reform became war liquidation in the eyes of the Hungarian optants.

The Roumanian Government thereupon raised the question of the incompetence of the Tribunal.

The agrarian reform began before the war ; it was introduced

for reasons of social peace and social welfare ; it is not therefore a war measure taken for the purpose of waging or of continuing a war. The agrarian reform is not a differential measure affecting ex-enemies as such, since it is applied to all landowners, whether they be nationals, allies, neutrals or ex-enemies. No profits are realised on this reform ; on the contrary, it costs the Roumanian Treasury considerable sums in compensation paid to the owners of land which has been expropriated and transferred to the peasants.

The agrarian reform is therefore in no sense war liquidation.

To ask the Roumano-Hungarian Mixed Arbitral Tribunal to pass judgment on the agrarian reform is to ask this Tribunal to pronounce on a matter entirely outside its jurisdiction, which is strictly limited to questions relating to the liquidation of ex-enemy property.

By a majority of two votes to one, the Tribunal by its decision of January 10th, 1927, nevertheless declared itself competent to hear and determine the question of the Hungarian optants, without seeking to assure itself whether it was a question of legal expropriation applicable to all owners irrespective of nationality or whether it was a question of differential measures affecting the Hungarians as such, hence a liquidation.

But any judgment given outside the jurisdiction of the arbitrators is and remains a dead letter. Such is the ransom for an award given outside the jurisdiction of the Court—the condition which must exist in order that full confidence may be placed in arbitral proceedings.

In these circumstances, Roumania refrained from discussing the question of substance and on February 24th, 1927, she declared that the Roumanian arbitrator would no longer take his seat on the Tribunal in connection with agrarian matters. This arbitrator was withdrawn from the Tribunal only in so far as concerned agrarian questions ; that is to say, only in respect of questions outside the jurisdiction of the Tribunal. That attitude was the legitimate defence of the Roumanian Government in a question taken up by the Roumano-Hungarian Mixed Arbitral Tribunal in excess of its authority.

Simultaneously with her withdrawal of her arbitrator, Roumania appealed to the Council of the League of Nations under Article 11, paragraph 2, of the Covenant with a view to stating

the reasons which had led her to withdraw the Roumanian arbitrator from discussions regarding agrarian matters.

The Tribunal having been guilty of an excess of authority, the decision whereby it declared itself competent was of no value and had no legal force. The question of the Hungarian optants was therefore a subject of dispute between Roumania and Hungary and was laid before the League of Nations.

Hungary then requested the Council to appoint a deputy arbitrator to replace the arbitrator who had been withdrawn.

The Council of the League of Nations asked Sir Austen Chamberlain to submit a report on the question in June, and at his request, the representatives of Chili and Japan were appointed to act with him.

This Committee of Three convened the representatives of Hungary and Roumania in London in May, and at Geneva in June, with a view to reaching a settlement between the parties. The meetings were, however, unsuccessful.

In these conditions, the Committee of Three examined the question and had it examined by jurists of the highest authority chosen from six different nationalities, and after obtaining their unanimous opinion it submitted its unanimous report on September 17th, 1927 (2).

The report laid down the principles which the signing of the Treaty of Trianon rendered obligatory for Roumania and Hungary, and made a distinction between expropriation and liquidation. Expropriation in virtue of agrarian reform does not fall within the jurisdiction of the Mixed Arbitral Tribunal. Only liquidation—that is, differential measures taken with a view to affecting the property of Hungarians as such—is within the competence of the Tribunal.

Roumania accepted the principles laid down in the report but Hungary rejected them.

The real nature of the claims submitted by the optants was revealed in the course of the discussion of the Committee's report. Hungary claimed, on behalf of the optants, not equal treatment with nationals, allies and neutrals, but a preferential treatment.

According to the Hungarian argument, the fact of being a Hungarian optant was sufficient to warrant a more favourable

(2) See the Report, page 29.

treatment than that accorded to all the other landowners in Roumania.

Consequently, the optants were not claiming that their property should not be liquidated, or that there should be no differential treatment of Hungarians as such ; on the contrary, they were claiming preferential treatment, more favourable than that accorded to nationals, allies and neutrals.

If this permanent privilege claimed by the Hungarian optants had been recognised, Roumania would never have succeeded in an agrarian reform applicable to all estates situated within her territory, notwithstanding the imperative and urgent necessity for such a reform. This principle was, moreover, absolutely contrary to the decisions taken at the Peace Conference on which the succession States relied when they signed the Treaty of Trianon. In point of fact, in reply to the request submitted by these States to the effect that a clause should be inserted in the Treaty explaining that the right of the optants to retain their immovable property did not mean that their rights had priority over those held by nationals, the Peace Conference declared that it was happy to confirm this interpretation but "*that, in its opinion, it did not appear necessary to insert an additional clause to maintain, without any kind of preference, under the régime of national law the property belonging to the optants.*"

Hungary herself, moreover, did not ask for anything beyond the fact that Hungarians and Roumanians should be on the same footing.

In fact, the maximum of the request submitted to the Peace Conference by Count Apponyi, the Principal Hungarian Delegate, was for equal treatment of Hungarians and Roumanians. The text of his request was as follows : "*We ask for a reassuring declaration to the effect that no property belonging to our nationals situated in the territories of the former Austro-Hungarian Monarchy should be sequestrated, liquidated or expropriated in virtue of a legal provision or by a special measure which does not apply in the same circumstances to the subjects of the liquidating State or the State carrying out this measure*" (3).

And the Treaty could not give them more than they had asked for.

(3) See the publication by the Hungarian Government : « *The Hungarian Peace Negotiations.* An account of the work of the Hungarian Peace Delegation from January to March 1920. Vol. 2, page 460.

The question may be summed up in one word. The question of the Hungarian optants is a problem of exchange. If the Roumanian currency were at the gold parity to-day, there would be no discontent. But when a whole nation is afflicted with a fall in the exchange, it is impossible to save one category of interests only, the Hungarian optants, from the consequences, especially when the Hungarian Government never asked more for them than national treatment and when Roumania signed the Treaty of Trianon only on the strength of the declaration of the Peace Conference that the property of the optants should remain under the régime of the national law, without preferential treatment of any kind.

The above is, in brief, the history of the question of the Hungarian optants.

After reading the opinions contained in this volume, the following are the ideas which stand out most clearly :

1) That in the question known as the "Affair of the Hungarian Optants", the Roumanian-Hungarian Mixed Arbitral Tribunal, in giving its award of January 10th, 1927, arrived at by a majority of two votes to one, exceeded its powers when it declared itself competent on a question which manifestly does not come within its competence ;

2) That neither common international law nor the peace treaties form any obstacle to the agrarian reform carried out in Roumania ;

3) That although the "Affair of the Hungarian Optants" has a certain legal aspect, its character is undeniably political in the highest degree.

4) That it is not only the right but even the duty of the Council of the League of Nations, to which Roumania submitted the question in virtue of Article 11 of the Covenant and Hungary in virtue of Article 239 of the Treaty of Trianon, to refrain from appointing a deputy in place of the Roumanian arbitrator on the Roumanian-Hungarian Mixed Arbitral Tribunal which — to employ the unanimous expression of these learned jurists — has been guilty of a "usurpation of power. "

5) That the attitude of the Council of the League of Nations in this affair, at the session of September 1927, is in conformity with legal principles and, in particular, with the letter and the spirit of the Covenant of the League of Nations.

6) That the Council now has before it a question which has been thoroughly examined and that there is no need to ask for the opinion of any other international institution.

DOCUMENTS

Decision of the Roumanian-Hungarian Arbitral Tribunal in a test-case relating to Hungarian optants[1]

The Roumanian-Hungarian Mixed Arbitral Tribunal, regularly composed of MM. de Cedercrantz, Chairman, Székacs and Antoniade, Arbitrators, assisted by M. Zarb, Secretary, meeting in full session at Paris, 57, rue de Varenne and deliberating *in camera;*

Considering the request submitted on December 29, 1923, by M. André Bartha, residing at Budapest (Hungary), 35, Erzsébet-Köruth (8th), whereby the Tribunal was asked:

1) To give a ruling by declaring that the enactments restricting the right of ownership as applied by the Roumanian Government to the property of the plaintiff are contrary to the provisions of Article 250 of the Treaty of Trianon;

2) To order the Roumanian Government to restore to the plaintiff his property free from all charges and in the condition in which it existed before the execution of the said enactments; further, to reinstate the property in its original position in the land registers;

3) To order the Roumanian Government to pay to the applicant compensation equivalent to the total loss suffered as a result of damage done to the property, and of loss of enjoyment, together with the reimbursement of all costs and expenditures incurred as a result of the application of the enactments against which the plaintiff protests;

4) In addition, to order the Roumanian Government to pay to the plaintiff the cost of replacing the whole or part of the said property as well as the whole or part of its accessories in the event

(1) Translated from the French version

of their restitution by the said Government being proved to be impossible;

5) To calculate the amount of the above-mentioned compensation *ex œquo et bono;*

6) To order the defendant to pay all costs and charges;

7) To request the Roumanian Government to suspend the execution of all measures restricting the right of ownership and of a nature to affect the property here in question;

Considering the exceptional request, recorded on June 16th, 1925, whereby the defendant concluded that the Tribunal was not competent in the matter;

Considering the reply to the exceptional request received on September 26th, 1925;

Considering the replication delivered on January 4th, 1926;

Considering the rejoinder received on April 15th, 1926;

Considering the corrigendum of the Roumanian Government received on November 27th, 1926;

Considering the documents in the dossier;

Considering the minutes of the hearings which were held in Paris on December 15th, 16th, 17th, 20th, 21st, 22nd and 23rd, 1926;

Having heard Maître Millerand, barrister at the Court of Appeal, Paris; Professor Politis and Maître Rosenthal, barrister at Bucarest, for the Roumanian Government;

Having heard Professors Gidel and Brunet, barristers at the Court of Appeal, Paris, for the plaintiff;

Having heard MM. Popesco-Pion and Gajzágó, Agents General of the Roumanian and Hungarian Governments respectively;

Whereas, in his exceptional request, the defendant urges that the measures objected to by the applicant were taken in virtue of the agrarian law in Transylvania and constitute expropriation measures under agrarian reform which apply to all land owners, whether nationals or foreigners; and, moreover, that compensation for expropriation is paid to all owners so dispossessed; that, in this case, it is not therefore a question of measures of retention or of liquidation in the meaning of Article 250 of the Treaty of Trianon and that, in consequence, the measures do not come within the jurisdiction of the Tribunal;

And whereas the defendant first urged that in order that a

claim under Article 250 may be brought before the Tribunal the measure objected to must have been taken between November 3rd, 1918, and the coming into force of the Treaty, that is July 26th, 1921;

And whereas this argument, developed by the defendant in the written procedure, was abandoned in the course of the oral discussions and note should be taken thereof;

And whereas it must first of all be pointed out that in inserting Article 250 in the Treaty of Trianon, the intention of the Allied and Associated Powers was fully to protect the property, rights and interests of Hungarian nationals, situated within the territory of the former Austro-Hungarian Monarchy, from all the measures mentioned in Article 232 and the Annex thereto, of Section IV, as well as in Article 250 itself, and to place these properties, rights and interests under the régime of common international law;

And whereas this emerges clearly from the preparatory work relating to Articles 267 of the Treaty of Saint Germain and 250 of the Treaty of Trianon as well as from the very language of this latter article;

And whereas it is therefore upon the principles of common international law that the Tribunal must rely whenever it is called upon to pass on a claim submitted by Hungarian nationals, optants or otherwise, regarding property, rights and interests situated within the territory of the former Austro-Hungarian Monarchy, when such property, rights and interests have been subjected to the measures enumerated in the said article;

And whereas, in this case, it is precisely to this latter point that the defendant refers in his argument, maintaining as stated above, that it is not a question of measures of retention or of liquidation in the meaning of Article 250;

And whereas, in order properly to judge of the question of the competence of the Tribunal it must above all be ascertained whether or not the measures here objected to have the characteristics of one or other of the measures which, in the terms of Article 250 can give rise to claims that can be laid before the Mixed Arbitral Tribunal; and whereas if the Tribunal finds that such is the case it is furnished with elements sufficient to establish its competence, but it is only after examining the substance of the claim that the Tribunal will be in a position to judge

whether the circumstances of the case are really of a nature to justify the application of Article 250;

And whereas the statement made by the defendant to the effect that these measures were taken in execution of the agrarian reform law in Transylvania, the Banat, Crishana and Maramures, has no bearing on the question of competence; and whereas it is only in the event of the Tribunal declaring itself competent that the defendant can, in submitting his arguments as to the substance of the matter, state his reasons based on agrarian reform legislation, or any other reasons he may wish to advance to prove that Article 250 should not operate in this case;

Whereas, regarding the measures forming the subject of the applicant's protest, his statements in this connection have not been contested by the other party and whereas it is therefore established that the applicant was the owner of certain rural immovable property situated at Szliágysomlyó, in the comitat of Szilágy, having a total area of about 2 1/4 cadastral jugars, that this property was first subjected to forced administration, then formally seized and finally taken away entirely from the applicant in virtue of agrarian legislation; that the Roumanian Government was substituted for the applicant as the registered owner; that an insignificant sum by way of compensation was promised but has not yet been paid;

Whereas, in order to judge of the import of this measure it is unnecessary to dwell on the question whether the compensation promised to the applicant is or is not to be considered adequate; that point, moreover, is essentially one of substance;

And whereas the other facts advanced by the applicant are sufficient to show that, in this case, it is a question of a measure affecting the ownership of ex-enemy property in that it was taken away in its entirety from the owner and without his consent; that this measure constitutes a violation of the general principle of the respect of acquired rights and oversteps the limits of common international law and that it is quite in the nature of a liquidation in the meaning of Article 250 and consequently falls to be included among the measures referred to in that article;

Whereas the defendant claims that the measure referred to in Article 250 under the name of "liquidation" is a war measure taken for war purposes, the most characteristic feature of which

is that it affects ex-enemy property "as such" and that the expropriations arising out of the agrarian reform do not, by their very nature, constitute liquidation since they are in no manner whatsoever discriminatory measures and, in any event, are not measures taken for war purposes; that they are therefore in no way incompatible with Article 250;

Whereas it emerges clearly from the provisions of Articles 232 and 250 and from paragraph 3 of the Annex to Section IV that the liquidation in the meaning of Article 250 can be either war liquidation or post-war liquidation, that the meaning of either of these operations is the same and that they differ only in their object; that, in both cases, it is a question of subjecting ex-enemy property, rights or interests to a treatment which constitutes a derogation to the rules generally applied in so far as concerns the treatment of foreigners and to the principle of the respect of acquired rights;

And whereas the question as to whether or not the expropriations referred to in this case are discriminatory measures is of essential interest regarding the substance of the dispute and does not therefore call for examination at this juncture;

Whereas, in these conditions, the Tribunal is undoubtedly competent to examine claims arising out of this measure and presented by a Hungarian national and whereas the question of deciding whether or not, in taking such a measure, the defendant was duly authorised to proceed in derogation to the principles of common international law is reserved for the examination of the question of substance;

Whereas in the course of the oral discussions the defendant advanced a new argument and urged that the compatibility of the expropriations with the treaty of Trianon was recognised by the representatives of the Hungarian Government in certain conversations which took place at Brussels on May 27th, 1923, between the representatives of the two Governments, as well as by the Council of the League of Nations in its resolution of July 5th, 1923;

Whereas the official texts published in the Journal of the League of Nations show that, by its application under date of March 15th, 1923, the Hungarian Government relying on the second paragraph of Article 11 of the Covenant of the League of Nations, called the attention of the Council of the said League to

the measures of expropriation being taken by the Roumanian Government in respect of immovable property belonging to persons who had opted in favour of Hungarian nationality, following the transfer of Hungarian territory to the Kingdom of Roumania, and that the Hungarian Government formulated certain demands in this connection; that after the Council had dealt with this question at its meetings of April 20th and 23rd, 1923, it formed the subject of negotiations at Brussels, in the month of May following, between the representatives of the two Governments, and that at its meeting of July 5th, 1923, the Council, after having considered the report of its rapporteur on the negotiations at Brussels, and the documents thereto appended, which included minutes of these conversations, approved the report and took note of the various declarations set forth in the minutes;

Whereas the defendant relies on the following passage contained in the minutes: "As regards the question of the discrepancy between Roumanian law and the provisions of the Treaty which deal with the rights of Hungarian optants, it is admitted — and the Hungarian representatives do not dispute the point — that the Treaty does not preclude the expropriation of the property of optants for reasons of public welfare, including the social requirements of agrarian reform";

Whereas the said minutes of the conversations which took place at Brussels between the representatives of the two Governments definitely state everywhere by whom the statements contained in them were made, either by reproducing textually such statements or by merely summarising them; and whereas the passage quoted by the defendant contains no such reference; and whereas for this reason alone, it is at least doubtful whether this passage actually constitutes a formal declaration, at any rate on the part of the Hungarian representatives; and whereas, in any case, the minutes later state that on examining the question of compensation "the Hungarian delegate was of the opinion that a payment in gold known as a deferred payment could not be taken into consideration. In matters of expropriation cash payment alone was justified", from which statement it may be assumed that in no case did the Hungarian delegates interpret the word "expropriation" contained in the passage quoted above to mean the withdrawal of property belonging to Hungarian

optants without adequate compensation; and whereas it follows from the foregoing that the finding of compatibility between the expropriations and the Treaty therefore necessarily presuppose, in the view of the Hungarian representatives, the observance of all the ordinary rules of expropriation, including the immediate payment of adequate compensation and whereas this part of the argument advanced by the defendant loses all value in view of these considerations;

Whereas, moreover, admitting for the sake of argument that it is a question of actual recognition — it is necessary to recall that this recognition was given during the conversations between the representatives of the two Governments with a view to arriving at an understanding on the matter forming the subject of the request of March 15th, 1923; that, in this connection the conversation turned on five different points which together constituted the very subject of the dispute between the two Governments and that the passage above quoted refers to the first of these points; and whereas, if a conciliatory declaration was made by the Hungarian representatives at an early stage of the negotiations it can, of necessity, be interpreted only as an expression of a desire to reach an understanding or as a concession made in the hope of obtaining like concessions from the opposite party on other points in order finally to arrive, by this means, at an understanding on all five points and thus on the entire matter in dispute, a result which was not achieved; and whereas in fact the minutes state under point 3 ("determination and nature of the compensation") that, after an exhaustive discussion and following declarations by both parties, "the two representatives considered it inadvisable to prolong the discussion on the question of the repurchase price, no reconciliation of their respective points of view appearing possible"; and whereas, although agreement was reached at Brussels on other disputed points — a matter with which the Tribunal is in no way concerned — it has, in any case, been established that on at least one point of primary importance the minutes had to record absolute disagreement between the representatives; whereas it is not admissible in law to detach, as the defendant does, an isolated statement from the text of the minutes without taking into account the circumstances in which it was made, to cite it as an official recognition by the Hungarian Government of a nature to bind all Hungarian

nationals and to deprive them, in consequence, of the right which they undeniably hold in virtue of Article 250 and which allows them to submit to this Tribunal all claims under that article; whereas, in these conditions, even if there really had been recognition by the representatives of the Hungarian Government, it should be noted that such recognition is of no value whatsoever in the settlement of the present dispute;

Whereas the defendant further declares that the plaintiff voluntarily appeared before the Roumanian Courts without alleging an exception to Article 250, that he submitted his defence as to the substance of the case and thus recognised that the measures to which objection is now raised constitute acts of expropriation; that having then recognised before the Roumanian courts that the agrarian laws constitute expropriation, the applicant cannot now claim before an international tribunal that the same laws constitute liquidation in the meaning of Article 250;

Whereas the defendant would be unable to invoke any principle of law in support of these allegations, which in fact, are contrary to the universally recognised principle, namely that in international jurisdiction there is nothing to prevent the individual concerned from exhausting first the means of recourse offered by national law before turning to international jurisdiction; and whereas the fact that he invoked only the national law before the Roumanian courts could not deprive him of the right to rely on the provisions of an international Treaty in pleading before this Tribunal;

Whereas, as already stated, the question of compensation is essentially one of substance and the Tribunal is consequently, at the present stage, not prepared to take into consideration the observations submitted by the defendant in this connection;

Whereas the defendant wrongfully cites in support of his argument a letter of August 13th, 1923, addressed to the Chairman of the Czechoslovak Delegation, alleging that it emanated from the Peace Conference; and whereas this letter is, in reality, signed by the Chairman of the Commission for the new States and Protection of Minorities and has no connection with the labours that preceded the drafting of the Treaty of Trianon but refers solely to the framing of certain articles of the Treaty on the protection of minorities and has no convincing weight in the present case;

For these reasons,

1) The Tribunal declares itself competent ;

2) Requests the defendant to deliver his reply on the substance of the question within a period of two months as from the date of the notification of the present decision;

3) Reserves the question of costs.

Paris, January 10th, 1927.

For the Roumanian Arbitrator : *Signed :* CEDERCRANTZ.

Signed : CEDERCRANTZ. *Singned :* SZÉKACS.

Dissenting opinion of the Roumanian Arbitrator in the agrarian questions laid before the Roumanian-Hungarian Mixed Arbitral Tribunal regarding the plea of incompetence[1]

The undersigned Roumanian arbitrator differs from the opinion expressed by the majority of the Tribunal as to the competence of the latter in the matter forming the subject of dossier No 141, a matter on which, in deference to international justice, the Roumanian Government has furnished explanations but has declared that it would not submit any conclusions as to the substance of the question and made all reservations as to the action it might take in the future (see *inter alia* the case for the defence submitted by Maître Millerand).

Subject to the foregoing, the undersigned Roumanian arbitrator submits the following statement:

Whereas by his request of the first process the applicant requests the Tribunal to give a ruling by declaring that the measure of expropriation taken in virtue of Roumanian agrarian legislation, in regard to his immovable property situated in Transylvania, is contrary to the provisions of Article 250 of the Treaty of Trianon; to order the Roumanian Government to restore his property to him free from all charges and to pay to him the damages incurred as a result of the expropriation; in addition, in the event that restitution in kind should prove to be impossible, to pay compensation in full, the amount of which shall be calculated *ex æquo et bono*, plus all costs and charges;

Whereas, before delivering any reply on the substance of the question, the Roumanian Government has submitted an exceptional request to the effect that the Tribunal should declare itself incompetent, since the measure taken in regard to the property of the applicant does not fall to be dealt with under Article 250,

(1) Translated from the French version

the only article which determines the competence of the Tribunal in this instance, and since the measure is a measure of expropriation taken in the interest of national welfare under agrarian reform laws and cannot be regarded as a measure of *retention or liquidation* in the meaning of that article ;

Whereas the ruling on the competence of the Tribunal is set forth in Article 250 in the following terms : "Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239", the whole discussion turns on the question whether the measure against which the applicant protests is a measure of *retention or liquidation* in the meaning of that article;

Whereas, before embarking upon an examination of this point, it is to be noted that, whenever it has been a question of passing on their own competence, the Mixed Arbitral Tribunals have displayed the utmost caution and as special international jurisdictions with limited competence, have invariably abstained from giving wide-reaching interpretations in order not to deprive the defendants of their natural judges;

Whereas this caution is all the more justified when, as in the present case, it is a question of a jurisdiction which in many respects is of a special nature, first by reason of the special character of this Tribunal and secondly by reason of the special provisions of Article 250 which depart from the general rule of Treaties in the matter of retention and liquidation of ex-enemy property in favour of a single ex-enemy Power and to the detriment of a single group of Allied Powers, viz: the Succession States; finally, by reason of the capacity of the defendant party, a sovereign State which cannot be indicted before a special court (whatever the status of this court might be) unless it has formally accepted such a procedure, in connection with acts committed in the free exercise of its sovereign powers ;

Whereas Article 250 contains an exception to a principle previously inserted in the same Treaty (and common to all the Treaties which put an end to the Great War) and provides that "Notwithstanding the provisions of Article 232 and the Annex to Section IV, the property, rights and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accord-

ance with these provisions", to understand the meaning and purport of this defence reference must be made to what is permissible in virtue of the general rule to which the new provision constitutes an exception;

Whereas the derogation contained in Article 250 in favour of Hungarian nationals refers to the provision of Article 232, paragraph *b*) which reserved to the Allied and Associated Powers the right to retain and liquidate all property, rights and interests which belong to nationals of the former Kingdom of Hungary, or companies controlled by them, and are within the territories, colonies, etc., of such Powers;

Whereas the powers granted by this clause which, it must be admitted, constitutes an important exception to the principles of common international law and a privilege in favour of the Allied and Associated Powers which has been regarded as exaggerated, have the character of special measures the nature and object of which, in the spirit and letter of the Treaty, must be defined;

Whereas the right to *retain and liquidate* is granted to the Allied Powers with a strictly definite object and, in so far as its effects are concerned, is regulated by various provisions to be found, in particular, in Section IV, Part X of the Treaty (cf. Article 232 h, j; paragraphs 4, 9 and 15 of the Annex, and Article 173 of Part VIII); and whereas this object is the reparation of war damage suffered by the Allied Powers and their nationals and for which Hungary is declared responsible (Article 161);

Whereas, apart from the characteristic deduced from their object, the measures of retention and liquidation so authorised have a distinctive feature due to their very nature: that of being essentially discriminatory measures, that is to say, they affect certain property, rights and interests in so far as they belong to ex-enemy nationals and solely because of the status of the owners; and whereas this distinctive feature was recognised by the Permanent Court of International Justice, which in its award No 7 (page 32) declares "that it is incontestable that the system of liquidation instituted by the Treaty of Versailles (as by the other Treaties) *refers to German property as such*";

Whereas the applicants have, both in the written proceedings and during the oral discussion, contested the discriminatory

character of the measures of retention and liquidation and, in support of their argument, have referred to the jurisprudence of the Mixed Arbitral Tribunal which in the case of special war measures taken and arrangements made by ex-enemy Governments within their territory to the detriment of the property, rights and interests of nationals of the Allied and Associated Powers does not require that such measures should be of a discriminatory nature before any decision can be taken regarding damage suffered by their nationals, a case which is met in particular by paragraph e of Article 232 (corresponding to Article 297 e of the Treaty of Versailles), a jurisprudence which they wish to extend by analogy to the cases of liquidation defined by Articles 232 b and 250;

Whereas Article 232 of the Treaty of Trianon (Article 297 of the Treaty of Versailles) refers to two different operations: on the one hand, measures taken during the war by the ex-enemy Governments in respect of property, rights and interests of Allied and Associated nationals (paragraphs a, e, f, g); on the other, measures taken during the war, or to be taken after the war with a view to reparation by the Allied and Associated Governments, in respect of property, rights and interests of ex-enemy nationals within their territory (paragraphs b, c, d, h, i, j); and whereas the jurisprudence cited has been established only in so far as concerns the first hypothesis, in which, being faced with the obligation to compensate an Allied national who, as a result of war measures, became involved against his will in a war against his own country, the Tribunals could not logically take the view that the only essential factor in the prejudicial measure was that it was taken for *war purposes*, the discriminatory nature of the measure not being indispensable to give it the character of a war measure; and whereas it is certain that in all the jurisprudence to which reference is made the identification of a discriminatory action can be dispensed with only in the case of a characterised war measure;

Whereas, although the Tribunals have not yet had occasion to express an opinion on the other hypothesis, where it is no longer a question of making good damage arising out of war measures, it is none the less true that the spirit and even the letter of their jurisprudence show that had they been called upon to pass on this second hypothesis they would have insisted on the

discriminatory nature of the measure, especially when dealing with liquidation operations effected after the war (cf. the jurisprudence which served as a precedent for all subsequent cases; German-Belgian Mixed Arbitral Tribunal : Rymenans and C° v. the German Government, Vol. I, page 878 and, in particular, considerations 1 and 2, page 885; consideration 3, page 887; consideration 4, page 888 and consideration 1, page 891) ; and whereas the objection thus deliberately confuses two distinct ideas and should be set aside and the discriminatory nature of the measure of liquidation maintained;

Whereas such are the characteristic features of the measures sanctioned by Article 232 b, the same features should be present in the case of a measure precluded by Article 250;

Whereas the measure of expropriation objected to by the applicant can in no way be assimilated to a liquidation since it is foreign to all idea of reparation of war damages and excludes all differential treatment; and whereas it emerges both from the history of Roumanian agrarian reform and from the provisions of the various laws applied in the several provinces of the Kingdom, — and in the present case, the agrarian reform law of July 30th, 1921, applied in Transylvania, the Banat, Crishana and Maramures — that it is here a question of extensive reform of a social and economic nature with a view to creating peasant ownership, the principle of which had been established by the Roumanian Government before the war and incorporated in the Constitution of the Kingdom by the constitutional law of July 20, 1927, — that it is therefore a question of a measure of a general nature dictated by the requirements of a sovereign State, the sole judge of its vital interests, and applicable to all landowners irrespective of nationality, to Roumanian nationals as well as to all foreigners, neutrals, allies or ex-enemies in the same legal conditions in so far as concerns the portion of property to be expropriated, the compensation to be paid and the conditions of payment;

Whereas, under these circumstances, it cannot be said, as alleged in the written proceedings, that the agrarian reform in Transylvania was merely a disguised means of affecting Hungarian owners only and, by a deceitful system, of arriving at a real liquidation of their immovable property; and whereas it would then be a question of doubting the good faith of a State, which,

according to all principles and in accordance with the jurisprudence of the Permanent Court of International Justice (award No 7, page 30) must always be taken for granted, it being incumbent upon the person contesting it to furnish proof of his allegation;

Whereas, expropriation for reasons of social welfare cannot, in view of these considerations, be assimilated to the juridical conception of liquidation, the measures taken by the Roumanian Government are therefore not inconsistent with Article 250 of the Treaty and the Tribunal might simply refuse to acknowledge its competence;

Whereas, moreover, the compatibility between agrarian expropriations in Roumania and the Treaty of Trianon was formally recognised by the Hungarian Government in an agreement reached on May 27th, 1923, at Brussels between its plenipotentiaries and those of the Roumanian Government, of which the Council of the League of Nations took note in its resolution of July 5th, 1923, at Geneva;

Whereas, as regards this agreement, the official documents published in the Journal of the League af Nations show that by a request dated March 15th, 1923, the Hungarian Government, acting under Article 11 of the Covenant, called the attention of the Council of the League of Nations to the measures of expropriation taken by the Roumanian Government in Transylvania in respect of immovable property belonging to persons having opted for hungarian nationality, and asked the said Council to decide that the legislative and administrative enactments of the Roumanian Government were contrary to the Treaties and to order that the immovable property belonging to Hungarian optants be restored to them with full compensation for the damage suffered; and whereas, as a result of this request, the Council, after having heard the representatives of the two Governments at its meetings of April 20th and 23rd, 1923, decided to postpone the examination of the matter to its July session and requested the parties to make every effort to arrive at an amicable settlement in the meantime; and whereas, during the interval that followed, M. Adatci, the rapporteur for this question, having summoned the representatives of the two Governments in order that they might under his auspices open negotiations with a view to a settlement, these representatives

proceeded to Brussels where their conversations ended on May 27th, 1923, in the drafting of a report, dealing with the five points forming the subject of the controversy between the two Governments and recording the declarations made by the parties on each of these points; whereas, in regard to the first point on the question of incompatibility between the Roumanian agrarian law and the provisions of the Treaty of Trianon relating to the rights of Hungarian optants *"it is admitted, and the Hungarian representatives do not dispute the point, that the Treaty does not preclude the expropriation of the property of optants for reasons of public welfare, including the social requirements of agrarian reform"*; and whereas, as a result of this document signed at Brussels and notwithstanding the disavowal by the Hungarian Government of its own plenipotentiaries, (a disavowal which the Council of the League of Nations did not think fit to take into consideration), the rapporteur taking the view that *"the two parties had, by mutual agreement, reached certain conclusions on several points forming the basis of the Hungarian request* and that he could not agree that the definite results obtained should again be brought into question", recommended the Council to take note of the declarations set forth in the Brussels document; and whereas the Council, at its meeting of July 5th, 1923, after having heard the representatives of the two Governments, the rapporteur and the statements made by several of its members who were all agreed as to the existence of the Brussels agreement settling the dispute between the two Governments, approved the report submitted by M. Adatci, took note of the various declarations contained in the minutes attached to the report, and added that it "hoped that both Governments would do their utmost to prevent the question of Hungarian optants from becoming a disturbing influence in the relations between the neighbouring two countries";

Whereas this agreement, in that it recognises that the Roumanian agrarian law is compatible with the Treaty of Trianon, represents the official interpretation which the two Governments concerned have given to the provisions of that Treaty regarding the immovable property of Hungarian nationals in transferred territory by recognising that the protection of this property does not preclude agrarian reform dictated by social requirements;

Whereas it is incontestable that the States which have signed

a Treaty have the authority and power to interpret it and to define the meaning and scope which their plenipotentiaries gave to its clauses; and whereas this interpretation is of an official nature and partakes of the compulsory force of the instrument itself in which it is incorporated; and whereas this interpretation is binding not only on the Governments which gave it and which cannot retract it, but also on their nationals who cannot give any interpretation other than the one agreed by their Governments;

Whereas, in order that such an interpretation may be valid, there is no necessity, as argued during the oral discussions, for it to be set forth in an agreed formula or subsequently and officially ratified, since according to diplomatic doctrine and practice it is sufficient for the interpretation adopted to be inserted in a protocol drawn up at the close of a conference or confirmed in an exchange of correspondence, or duly recorded in the form of reciprocal declarations (cf. Fauchille, *Traité de Droit International Public*, Vol. 1, page 373 ff and the examples therein mentioned);

Whereas the applicants, defendants in the exceptional request, deny firstly that there was any agreement at Brussels and assert that the instrument signed on May 27th, 1923, merely records the failure to reach agreement on various points; and whereas, in any case, if a declaration were made by the Hungarian plenipotentiaries as to the inconsistency between the Roumanian agrarian reform and the Treaty, it was intended to refer exclusively to expropriation with adequate compensation in accordance with the rules of international law; and whereas, finally, the declarations made at Brussels form an indivisible whole from which it is impossible to detach an isolated statement and use it in evidence; and whereas this isolated declaration, which was made solely with a view to obtaining concessions on other points under discussion, loses all its value when no agreement exists on the principal point, namely the amount of the compensation to be paid to the expropriated persons;

Whereas the first objection, that is the non-existence of the agreement, is fully answered by the documents themselves; and whereas, if no agreement was reached, it is difficult to understand why the Hungarian Government felt it necessary to disown its plenipotentiary, a step which the Council did not see fit to

discuss; and whereas it is inconceivable that such an important and powerful body as the Council of the League of Nations should have considered, discussed at length and finally ratified an instrument that did not exist;

And whereas, in regard to the second objection, it is certain that during the Brussels negotiations the discussions did not bear on agrarian reform in the abstract with a view to defining the general principles of international law but on the Roumanian agrarian reform *in concreto*, all the particulars of which were known to both parties, a reform which, with all its definite conditions, formed the very substance of the request submitted by the Hungarian Government to the Council of the League of Nations;

And whereas, in regard to the last objection, — indivisibility of the Brussels agreement — this argument loses all value in view of the fact that the plenipotentiaries, who agreed to discuss in their logical order all the reasons advanced in the Hungarian request, first examined the question of principle which dominated the whole issue, viz : compatibility or incompatibility between the agrarian law and the Treaty, the only international question in the controversy, the other points for discussion : absenteeism, conditions of payment of the compensation, the amount of such compensation, the provisions of Article 18 of the Roumanian Constitution and various other specific provisions of the agrarian law, being merely questions connected with the internal legislation of Roumania; if therefore an agreement was reached on the primary question and if it was recognised that the Roumanian Government had not violated the Treaty of Trianon — as was in fact recognised — the entire question lost its international importance and became an internal question to be dealt with exclusively by the sovereign State of Roumania; and whereas it cannot therefore be validly alleged that the crux of the controversy was other than this; and whereas this point was recognised by the Council of the League of Nations which merely took note of it and made the following recommendations to the parties : "The Council is convinced that the Hungarian Government, after the efforts made by both parties to avoid any misunderstanding on the question of optants, will do its best to reassure its nationals, and that the Roumanian Government will remain faithful to the Treaty and to the principle of justice upon

which it declares that its agrarian legislation is founded, by giving proof of its goodwill in regard to the interests of the Hungarian optants";

Whereas, in view of this agreement on the compatibility between the agrarian expropriations and the Treaty of Trianon, the question of the competence of this Tribunal is definitely settled in the sense that the Tribunal is radically competent and all further examination becomes henceforth superfluous;

Whereas, apart from the recognition on the part of the Hungarian Government, the Hungarian applicants themselves have explicitly recognised that the measure affecting them was juridically an act of expropriation and was not in the nature of a liquidation precluded by Article 250, this being recognised in the proceedings before the Roumanian courts competent in the matter of expropriation when all the applicants exhausted the course of procedure by submitting their case in a detailed manner in so far as concerned the substance of the question without pleading an exception to Article 250 or without making the slightest reservation as to the nature of this measure; and whereas these applicants recognised, in a property question and on the basis of a legal contract freely entered into, which led to juridical decisions having the authority of *res judicata*, that the agrarian laws applied to them constituted expropriation and not liquidation and therefore can no longer claim before an international court that these same laws constitute a liquidation in the sense of Article 250;

Whereas, in order to annul these decisions having the authority of *res judicata*, recourse cannot be had to a rule of international law whereby a case must be examined by all the competent national courts before it can be referred to international tribunals, since this rule presupposes that it is the same case which is laid before the international tribunal; and whereas, in the present instance, in virtue of a legal contract freely entered into, the plaintiffs finding themselves confronted by decisions having the authority of *res judicata* on the nature of the measure taken, seek to institute fresh proceedings before the international tribunal for an examination of the case on a new basis, viz : liquidation;

Whereas, in reply to these juridical arguments the Hungarian applicants, in order to involve the competence of the Tribunal

at any cost, allege that, as a result of the return to common international law by the insertion of Article 250 as an exception to the provisions of Article 232 b, the property of Hungarian nationals in ceded territory acquired a special statuts which protects it for all time from any prejudice and that in consequence and in accordance still with Article 250, the Mixed Arbitral Tribunal shall be competent whenever there arises a question of such prejudice; that the measures of retention and liquidation precluded by Article 250 are therefore acts which in some way transgress the rules of common international law and that, for the tribunal to be competent it is sufficient that a measure taken against Hungarian property should have the appearance or offer the theoretical possibility of infringing a rule of common international law;

Whereas this twofold thesis must be examined in the light of the express provisions of the Treaty and the principles of international law;

Whereas, if it is true that Article 250, annulling the privilege of Article 232 b, reverted to common international law in so far as Hungarian property in transferred territory is concerned, it does not necessarily follow that a preferential status is thereby created for such property but simply that the protection granted to all foreign property is extended to the property in question;

Whereas the doctrine of international law as well as the conventional jurisprudence whereby these questions are settled between States, recognises that a foreigner is entitled to protection, personally as well as in regard to his property, in the same way that nationals are protected by the laws of their country; and whereas this equal treatment implies that the immovable property of a foreigner is subject to the laws governing immovable property in the country in which they are situated; and whereas, although there has recently been a tendency among certain publicists to claim greater protection for property owned by foreigners than that given to nationals, this tendency is not generally supported by doctrine or adopted in conventional law (cf. Fauchille, op. cit. Vol. 1, pages 930-944; de Louter, *Droit International Positif*, Vol. I, page 206; Treatise by Professor Borchaert in Bibl. Vischeriana, Vol. III, page 9 ff);

Whereas Hungarian property, like all foreign property is, under common international law, treated in exactly the same

manner as the property of nationals and expropriation for State requirements (public or national) — a necessary and vital institution for the State — is therefore not excluded in principle and can be applied to foreigners and nationals alike;

Whereas the accounting system regarding expropriation for reasons of public welfare in accordance with common international law is formally recognised by the Permanent Court of International Justice by its decision N° 7 (page 22);

Whereas the principle of national treatment is the rule generally recognised in international law and was therefore followed in several articles of the Treaty of Trianon (and in all the other Treaties) in connection with Allied property, rights and interests in Hungarian territory, particularly in paragraph c of Article 211 in which Hungary undertakes "not to subject the nationals of the Allied and Associated Powers, their property, rights or interests... to any charge, tax or import, direct or indirect, other or higher than those which are or may be imposed on her own nationals or their property, rights or interests"; and in Article 233 b, to which there is a corresponding article in all the other treaties (Versailles 298, Saint-Germain 250, Neuilly 178), in which Hungary undertakes "not to subject the property, rights or interests of the nationals of the Allied or Associated Powers to any measures in derogation of property rights which are not applied equally to the property, rights and interests of Hungarian nationals"; and whereas this same paragraph adds : "and to pay adequate compensation in the event of the application of these mesures ", it is to be noted that it does not provide the competence of the Mixed Arbitral Tribunal by way of sanction, which provision would have been no more than a logical counterpart if the said competence had been admitted for the examination of cases of expropriation imposed on Hungarian nationals in transferred territory and if it were the duty of these tribunals to pass on all acts which were in derogation of common international law;

Whereas the application of the principle of equal treatment was claimed by the Hungarian Government itself in the course of the labours which preceded the signing of the Treaty of Trianon; and whereas, first by its Note N° 8 of January 14th, 1920, calling the attention of the Peace Conference to the danger threatening Hungarian property in ceded territory as a result

of certain schemes of agrarian reform in Czechoslovakia and Roumania, the Hungarian Government requested that, in regard to the latter State, a special clause should be inserted to the effect that "physical or legal persons belonging to the Hungarian minority shall not be subject, either in law or in fact, to any treatment which, from the point of view of their material interests, differs from that of Roumanian nationals proper"; and whereas in the observations subsequently presented by the Hungarian Delegation concerning Article 250 (Note XXXVII in the documents published by the Hungarian Ministry for Foreign Affairs, Budapest, 1921, 2 vols. entitled 'The Hungarian Peace Negotiations'), the said Delegation, cognisant of the tenor of Article 250 in the matter of exemption from retention and liquidation and considering that this article was not a sufficient safeguard against possible expropriation by Roumania or Czechoslovakia, asked for a "reassuring statement to the effect that no property belonging to our nationals on the territory of the former Austro-Hungarian Monarchy shall be sequestrated, liquidated or expropriated by virtue of a legal provision or by means of a special measure which does not apply, in the same conditions, to the subject of the liquidating State or of the State putting such a measure into force", — a reassuring statement which, moreover, the Peace Conference refused to give (covering letter from the President of the Conference); and whereas all these documents show that national treatment represented the limit of the requests submitted by the Hungarian Government itself regarding the protection of Hungarian property in transferred territory;

Whereas further proof of the spirit which prevailed at the time of the framing of the Treaties regarding the position of ex-enemy property in Allied territory is found in the letter dated August 13th, 1919, from the President of the Commission for the new States and the Protection of Minorities to the Czechoslovak Delegation, (filed with the documents of the case); and whereas this Delegation, at the time of the drafting of Article 3 — Treaty on Minorities (the text of which corresponds to Article 63, paragraph 4 of the Treaty of Trianon) which provides that Hungarian optants will be entitled to retain their immovable property in the territory of Czechoslovakia, — asked that this right be made subordinate to the condition that the property of the

optants be subject to the same régime as that of Czechoslovak nationals and was informed in reply that "the Commission had not considered that the insertion of an additional clause was necessary to ensure that all property situated within the territory of the Republic of Czechoslovakia would be subject to the régime of Czechoslovak law without any preference whatsoever";

Whereas it cannot therefore be deduced that any privilege whatsoever was established in favour of Hungarian property in transferred territory; whereas it is all the more necessary to refute the extreme, and at least dangerous, argument submitted in the written pleadings and heard during the oral discussions, that in addition to being protected by common international law immovable property belonging to Hungarians in Transylvania enjoys also a real privilege or a kind of mortgage secured on the territory of Transylvania granted to it in compensation for the dismemberment of Hungary and as a condition governing territorial cessions;

Whereas the radical flaw in the argument claiming such a privilege lies in the hazardous allegation that since Article 250 by excluding the principle of liquidation reverts to common international law and consequently precludes and penalises any derogation to this right; and whereas, for this to be true, any violation of the principle of common international law would have to constitute a liquidation, a consequence which cannot be proved for the simple reason that the extension of the two conceptions is not identically similar, since the scope of the idea of a "derogation to international law" is very much wider than that of the idea of "liquidation";

Whereas this argument, which relies on a *petitio principii*, since it assumes as proved precisely what remains to be proved, is inadmissible, its consequence, — the supplementary argument to the effect that the Mixed Arbitral Tribunal is competent to hear and determine not only all cases of violation or of derogation to common international law but also all cases of apparent or possible derogation —, has also little legal force and should share the same fate;

Whereas the theory of the Mixed Arbitral Tribunal, the perpetual guardian of common international law, invalidates itself by the inadmissible consequences to which it leads; and whereas, if this theory were admitted, these Tribunals, which

are special courts with limited jurisdiction, would thus become courts vested with the most extensive international jurisdiction in existence restricted only by the very vaguely defined limits of common international law; and whereas by such an inordinate extension of competence, these tribunals would have to hear and determine not only all cases closely or remotely affecting the property, rights and interests of Hungarian nationals in transferred territory but would also exercise control over all internal legislation of the Succession States, including fiscal laws and their application and even over their most vital social laws and so over their very Constitution; and whereas this would ultimately amount to recognising that the Treaty of Trianon imposed upon Roumania, Czechoslovakia and the Kingdom of the Serbs, Croats and Slovenes, in favour of Hungary, a kind of capitulation more extensive and more humiliating than that imposed on uncivilised countries;

Whereas all the foregoing considerations lead to the conclusion that Article 250 can apply only to the hypothesis therein mentioned, namely retention and liquidation with a view to reparation; that a measure of expropriation by virtue of agrarian reform (a non discriminatory measure) cannot be assimilated to liquidation—the only measure falling within the competence of the Mixed Arbitral Tribunals; that even if in connection with such expropriation it were objected that there was derogation to common international law on the grounds that the compensation granted to the dispossessed owners was inadequate, an examination of the controversy shows that the rules by which the compensation is fixed are the same for both Roumanian and Hungarian owners and that, in any case, it is not for this Tribunal to hear and determine this question of derogation;

Whereas, in these conditions, the Tribunal cannot, in contradiction with the definite texts and the principles which should govern its actions, extend its jurisdiction without being guilty of a manifest abuse of power;

For these reasons,

The undersigned arbitrator is of the opinion that the Mixed Arbitral Tribunal is not competent to take up the matter forming the subject of the dossier with a view to examining the substance of the question.

Paris, January 10th, 1927. *Signed* : C. ANTONIADE.

The Report of Sir Austen Chamberlain to the Council of the League of Nations[1]

" This question, as set out in the above titles, is only one aspect of the question which was submitted successively to the Conference of Ambassadors and the Council of the League of Nations in 1922 and 1923.

" On August 16th, 1921, the Hungarian Government applied to the Conference of Ambassadors in regard to the expropriation — undertaken by Roumania in connection with the scheme of agrarian reform — of the immovable property of persons who, while possessing rights of citizenship (*indigénat*) in the territories transferred to the Kingdom of Roumania by the Treaty of Trianon, had opted for Hungarian nationality under Articles 63 or 64 of that Treaty, and also under Article 3 of the Roumanian Minorities Treaty. The Conference of Ambassadors, in a note dated August 31st, 1922, informed the Hungarian Government that its claims related entirely to the stipulations of the Treaty between Roumania and the Principal Allied and Associated Powers concerning minorities, and should, under the Treaty, be addressed to the League of Nations. On a further request by the Hungarian Government, the Conference of Ambassadors, in a letter dated February 27th, 1923, informed Hungary that she, or another Member of the League, should take the initiative in bringing the matter before the Council.

" Hungary therefore applied to the League of Nations, stating that a satisfactory solution had not been obtained by direct negotiations, and formulating the following demands :

> " (1) That the Council should deal with the substance of the question, in view of the urgency of the matter, at its next session ;

(1) C/47th Session/P.V.1.

« (2) That it should give a ruling on the substance of the question by declaring that the Roumanian legislative and administrative enactments in question were contrary to the Treaties ; by ensuring, as regards the future, that Roumania should act in conformity with the provisions of the Treaties; by ordering that the immovable property of Hungarian optants should be restored to them and that it should in future be free from all charges contrary to the provisions of the Treaties ; and, finally, that full compensation for damage should be given to the injured parties.

" The Council considered this question in April and July 1923. The proposals made at the April session to refer the question to the Permanent Court to obtain a decision, or even an advisory opinion, were not accepted by the Roumanian representative.

" M. Adatci, the Rapporteur, was then requested to prepare the ground for a fresh discussion before the July session of the Council, and the Council expressed the hope that, in the interval between the sessions, the two Governments would do their best to reach an agreement. With this object, the representatives of Hungary and Roumania proceeded, on the invitation of M. Adatci, to Brussels on May 6th, 1923. The results of these negotiations will be found in a report to which a draft recommendation and a summary of the conversations were appended (see Annex 533*a*, page 1011, of the *Official Journal*, August 1923).

" On July 5th, 1923, during the twenty-fifth session of the Council, the Brussels negotiations were the subject of protracted discussions, the Roumanian delegate appealing to the Brussels 'Agreements' and the Hungarian delegate stating that no agreement had been reached. The following resolution was then proposed :

"The Council,

" After examining the report by M. Adatci dated June 5th, 1923, and the documents annexed thereto ;

"Approves the report ;

"Takes note of the various declarations contained in the Minutes attached to the report of the Japanese representative, and hopes that both Governments will do their utmost to prevent the question of Hungarian optants from becoming

a disturbing influence in the relations between the neighbouring two countries.

"The Council is convinced that the Hungarian Government, after the efforts made by both parties to avoid any misunderstanding on the question of optants, will do its best to reassure its nationals ;

"And that the Roumanian Government will remain faithful to the Treaty, and to the principle of justice upon which it declares that its agrarian legislation is founded, by giving proof of its good will in regard to the interest of the Hungarian optants.'

" This resolution was adopted by all the members of the Council, with the exception of the Hungarian delegate, who refrained from voting and stated that, in his opinion, the whole problem remained open ; he added, *inter alia*, that his Government reserved the right to take any further steps which the Treaties and the Covenant of the League of Nations might allow in order to obtain justice for those whom he had the right and the duty to represent.

" From December 1923 onwards, a number of applications from Hungarian nationals or optants owning lands in the territories transferred to Roumania were submitted to the secretariat of the Roumano-Hungarian Mixed Arbitral Tribunal, provided for in Article 239 of the Treaty of Trianon, asking, among other matters, that the Tribunal should declare that the measures restricting their right of ownership, which had been applied to their movable and immovable property by the Roumanian State, were contrary to the provisions of Article 250 of the Treaty of Trianon, and that it should order the Roumanian State to make restitution.

" In 1925, the Roumanian Government submitted applications objecting to the jurisdiction of the Tribunal. After hearing the counsel of the two parties between December 15th and 23rd, 1926, the Tribunal, on January 10th, 1927, declared itself competent, in virtue of Article 250, paragraph 3, of the Treaty of Trianon, and called upon the defendant (Roumania) to forward her reply within a period of two months.

" On February 24th, 1927, Roumania informed the Tribunal that she would refrain from submitting her reply regarding the substance of the question and that, consequently, her arbitrator

would no longer sit in connection with any of the agrarian matters brought forward by Hungarian nationals. At the same time, she submitted to the Council, in virtue of Article 11, paragraph 2, of the Covenant, a request to allow her to acquaint the Council with the reasons on which her attitude was based.

"This question came before the Council on March 7th, 1927.

"The Roumanian representative explained the reasons which had led the Roumanian Government to withdraw its arbitrator from the Tribunal.

"The Hungarian representative asked the Council to appoint, in accordance with the Treaty of Peace, two members to enable the Tribunal to continue its work.

"The Council, on the proposal of the President, requested the British representative to report on this question at its next session. Sir Austen Chamberlain having expressed the desire that two of his colleagues should be appointed to act with him for the purpose of examining the question, the Council requested the representative of Japan and the representative of Chile to assist Sir Austen Chamberlain in preparing a report for the next session. The two parties to the dispute accepted this proposal, which was adopted by the Council.

"On May 31st, Sir Austen Chamberlain, on behalf of the Committee of Three, convened the Roumanian and Hungarian representatives in London. The conversations took place on May 31st and June 1st. The delegates of both countries stated at the outset that they could not definitely bind their Governments. The Committee first of all heard the additional statements of the two parties and certain particulars which they furnished. The Committee thought it its duty to try all possible means of reaching a final solution by conciliation. In doing so, it was confident that it was fulfilling the wishes of the Council and conforming to the established practice of that body. It therefore asked the delegates to obtain from their respective Governments all possible concessions with a view to reaching a satisfactory solution. On the proposal of the Committee, the delegates of the two Governments agreed to inform the Committee of the point of view of their respective Governments at the June session of the Council.

"At the June session of the Council, the Committee of Three met on several occasions at Geneva and maintained close contact with the representatives of the two Governments.

"Looking at the problem as a whole, the Committee desired

to find a solution which would allay discontent. It could not forget that the matter had originally been submitted to the Council not under Article 239 of the Treaty of Trianon but under Article 11 of the Covenant, and that its intervention had been asked for, on that occasion, first of all by Roumania and then by Hungary. In these circumstances, it could not evade the duty imposed on it by the Covenant and confine itself simply to the election of the two deputy members for the Mixed Arbitral Tribunal, which the Hungarian representative had as a result of the proceedings demanded.

"If it did so, it would have failed to discharge its political duties as a mediator and conciliator in a dispute which extended far beyond the actual terms in which it had been originally submitted by the two parties.

"Moreover, the Committee could not take a purely and strictly legal view of the Council's duties, especially as it realised that the election of the two deputy members would not have finally ended a difference which had been successively submitted to three international authorities.

"On the contrary, it attempted on more than one occasion to bring about a general settlement which would have terminated the controversy and led to better feelings.

"The Council, however, had further reasons for not playing a purely mechanical part.

"In 1923—as to-day—the two parties stated their points of view at great length and dealt with all aspects of the dispute both as regards substance and form.

"The Council has merely followed the discussions of the two parties, and, having regard to the complexity of the problem, it recommended them in 1923 to do everything possible to prevent the question of the optants from becoming a disturbing influence in the relations between the two neighbouring countries.

"It recommended Hungary to reassure her nationals and Roumania to give evidence of good will in regard to the interests of the Hungarian optants.

"Would the question with which we have been dealing since our session last March have arisen if the two parties had followed these recommendations?

"The Committee of the Council during its June session submitted certain formulas to the two parties, always with a view

to conciliation and in the hope that the two Governments would agree.

"The Committee is forced to confess that its hopes have been disappointed and that the two parties have been unable to accept the conciliatory formulas which it proposed.

"As the two parties rejected the compromise proposed by the Committee of Three, the latter convened them again on September 2nd, with a view to a final attempt at conciliation. During these fresh conversations, the representatives of the two countries communicated certain proposals to the Committee. The Hungarian representative renewed the offer made in March that the question of jurisdiction of the Mixed Arbitral Tribunal should be referred to the Permanent Court of International Justice, but declared that he was unable to make new concessions. This offer was not accepted by the Roumanian representative, who in his turn submitted certain formulas based on the proposals made by the Committee of Three with a view to compromise. These formulas were rejected by the Hungarian representative. Under these circumstances, the Committee of Three was compelled to abandon its hope of reaching a settlement by direct conciliation.

"The Committee was therefore obliged to seek a solution by other methods. A minute examination of the question of the Mixed Arbitral Tribunal's jurisdiction seemed to be of primary importance. It therefore asked the following questions :

> "1. Is the Roumano-Hungarian Mixed Arbitral Tribunal entitled to entertain claims arising out of the application of the Roumanian Agrarian Law to Hungarian optants and nationals?
>
> "2. If the answer to that question be in the affirmative, to what extent and in what circumstances is it entitled to do so?

"The Committee, after examining these questions and having them examined by eminent legal authorities, arrived at the following conclusions:

"The Mixed Roumano-Hungarian Arbitral Tribunal owes its establishment to the Treaty of Trianon. It is an international tribunal and its jurisdiction is therefore fixed by the terms of the Treaty which created it. It has no jurisdiction beyond that which the agreement of the contracting parties has conferred on

it. The limits of its jurisdiction are defined by Articles 239 and 250 of the Treaty of Trianon.

"The question at present submitted to the Council for examination relates to the claims addressed under Article 250 to the Mixed Arbitral Tribunal by Hungarian nationals. The provisions of this article prohibit the retention and liquidation, dealt with in Article 232 and in the Annex to Section IV of Part X of the Treaty, of the property of Hungarian nationals situated in the territory of the former Austro-Hungarian Monarchy. They also provide for the restitution to their owners of goods freed from any measure of this kind and from any other measure of disposal, of administration or of sequestration taken in the period which elapsed between the Armistice and the entry into force of the Treaty. They authorise the submission of claims, by claimants who are Hungarian nationals, to the Mixed Roumano-Hungarian Arbitral Tribunal provided for in Article 239.

"If it could be established in any particular case that the property of a Hungarian national suffered retention or liquidation or any other measure of disposal under the terms of Articles 232 and 250 as a result of the application to the said property of the Roumanian Agrarian Law and if a claim were submitted with a view to obtaining restitution, it would be within the jurisdiction of the Mixed Arbitral Tribunal to give relief.

"The Mixed Arbitral Tribunal is not competent to give decisions on claims arising out of the application of an agrarian law as such unless the case mentioned in the preceding paragraph of an agrarian law was involved.

"Since these considerations show that the claim of a Hungarian national for restitution of property in accordance with Article 250 might come within the jurisdiction of the Mixed Arbitral Tribunal even if the claim arises out of the application of the Roumanian Agrarian Law, we shall proceed to the definition of the principles which the acceptance of the Treaty of Trianon has made obligatory for Roumania and Hungary.

"1. *The provisions of the peace settlement effected after the war of 1914-18 do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.*

"Article 250 forbids the application of Article 232 to the property of Hungarian nationals in the transferred territory. Under

the terms of Article 250, the prohibition to retain and liquidate cannot restrict Roumania's freedom of action beyond what it would have been if Articles 232 and 250 had not existed. Even if none of these provisions appeared in the Treaty, Roumania would none the less be entitled to enact any agrarian law she might consider suitable for the requirements of her people, subject to the obligations resulting from the rules of international law. There is, however, no rule of international law exempting Hungarian nationals from a general scheme of agrarian reform.

"The question of compensation, whatever its importance from other points of view, does not here come under consideration.

"2. *There must be no inequality between Roumanians and Hungarians, either in the terms of the Agrarian Law or in the way in which it is enforced.*

"Any provision in a general scheme of agrarian reform which either expressly or by necessary implication singled out Hungarians for more onerous treatment than that accorded to Roumanians, or to the nationals of other States generally, would create a presumption that it was intended to disguise a retention or liquidation of the property of Hungarian nationals *as such* in violation of Article 250 and would entitle the Mixed Arbitral Tribunal to give relief. The same would apply in the case of a discriminatory application of the Agrarian Law.

"The prohibition against the holding of immovable property by Hungarians in the territories transferred to Roumania, even if applied to all foreigners, would not be in accordance with the obligations which Roumania has contracted by the Treaty to permit Hungarian optants to keep their immovable property, but this is a question which does not come within Article 250.

"3. *The words 'retention and liquidation' mentioned in Article 250, which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territories and in so far as such owner is a Hungarian national.*

"The right which the Allied Powers reserved to themselves under Article 232 to retain and liquidate Hungarian property within their territory at the time of the entry into force of the Treaty applies to the property of a Hungarian inasmuch as he is a national of an ex-enemy country. It is not sufficient that these

measures entail the retention of Hungarian property by the Government and that the owner of this property is a Hungarian. The measure must be one which would not have been enacted or which would not have been applied as it was if the owner of the property were not a Hungarian.

"The Committee of the Council therefore ventures to suggest that the Council should make the following recommendation:

"*a*) To request the two parties to conform to the three principles enumerated above;

"*b*) To request Roumania to reinstate her judge on the Mixed Arbitral Tribunal.

"The Committee of the Council hopes that the two parties, in so far as each is concerned, will accept these proposals."

"In the event of a refusal by Hungary, the Committee considers that the Council would not be justified in appointing two deputy members in accordance with Article 239 of the Treaty of Trianon.

"In the event of a refusal by Roumania, in spite of the acceptance by Hungary of the above proposals, the Committee considers that the Council would be justified in taking appropriate measures to ensure in any case the satisfactory working of the Mixed Arbitral Tribunal.

"In the event of a refusal of the above recommendations by both parties, the Committee considers that the Council will have discharged the duty laid upon it by Article 11 of the Covenant."

OPINIONS

on the duties and powers of the Council of the League of Nations

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The Agrarian reform : The Hungarian-Roumanian Controversy before the Council of the League of Nations[1]

BY

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Roumania, like certain other European countries, had for some time past been in a peculiar position regarding the distribution of rural property; half the country, or about four million hectares, was owned by only four thousand persons out of a population of more than seven million inhabitants. This abnormal state of affairs gave rise to considerable unrest which threatened to disturb social peace. Reforms were absolutely necessary and the Bucarest Government took up the matter as early as 1913.

Inspired by the present and future interests of the country, the Government endeavoured to democratize property and, for this purpose, introduced the agrarian laws of 1917 and 1918, which were completed by those of 1920 and 1921. These laws entirely revolutionised rural life by transferring practically the whole of the arable land of the country to the peasant population, which until then had cultivated it only as agricultural labourers. On more than one occasion, these laws gave rise to energetic protests from the dispossessed owners for, by very reason of the object in view, they were applied to all the inhabitants without distinction, both to nationals and foreigners.

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(1) Article published in *l'Europe Nouvelle*, N° 507 of 29.10.27, page 1450, and translated from the French version.

Immediately after the war of 1914-1918, Transylvania which had hitherto formed part of the Austro-Hungarian Monarchy was allotted to Roumania by virtue of the Treaty of Trianon.

The agrarian laws in force in Roumania, and those subsequently enacted, were applied in this province in exactly the same manner as in the former Roumanian territories and other newly acquired territory: Transylvania, the Banat, Bukovina, and Bessarabia. They consequently affected the "Hungarian optants", who had retained possession of their landed property.

The Hungarian Government interpreted the application of the agrarian laws to its nationals as a measure of liquidation, or rather as an act of spoliation.

On March 15th, 1923, it addressed a request to the Council of the League of Nations. This document after briefly setting forth the facts of the case, asked for a decision on the substance of the matter and, in accordance with Article 232 of the Treaty of Trianon, that it should be decided :

1) That the Roumanian legislative and administrative enactments were contrary to the Treaty;

2) That the immovable property of Hungarian optants expropriated as a result of the Roumanian agrarian reforms should be restored to them;

3) That full compensation for the above damage should be given to the injured parties.

At the meeting of the Council held on April 20th, 1923, the Roumanian Government maintained that Article 232 was in no way in question; it declared that no act of spoliation had been committed against Hungarian nationals since the agrarian laws applied without discrimination to all the inhabitants of the country and that the Hungarian landowners were treated in exactly the same manner in law and in fact as the Roumanian owners. It added that the granting of such a request would be equivalent to creating a privilege in favour of Hungarian optants, which the Treaty of Trianon had no intention of establishing.

The Council adjourned the examination of the question to its July session and requested the parties to do their utmost to arrive at an amicable settlement before that date.

Pursuant to the wish expressed by the Council, M. Adatci, appointed rapporteur on this question, asked the Hungarian and Roumanian representatives to meet in Brussels on May 25, 1923, with a view to a discussion of the matter under his auspices.

These negotiations ended in the drafting of minutes dated May 27th, in which it was stated, in particular, that "*it is admitted, and the Hungarian representatives do not dispute the point, that the Treaty of Trianon does not preclude the expropriation of the property of optants for reasons of public welfare, including the social requirements of agrarian reform.*"

A draft resolution on these lines was accepted by the two parties on May 29th, and the matter could have been regarded as closed if, on June 12th, the Hungarian Minister for foreign Affairs had not informed M. Adatci that the Hungarian Government could not stand by the resolution accepted by its representative at Brussels, who had exceeded his powers and had signed with "*an absence of mature reflection which the very serious nature of the act would have required.*"

In a memorandum addressed to M. Daruvary, Hungarian Minister for Foreign Affairs, M. Adatci expressed his surprise at the attitude of the Hungarian Government and laid stress on the fact that the work of the Council of the League of Nations would be rendered impossible, if, in contravention of all international use, the delegates sent by the Parties and duly authorised by them to negotiate under the auspices of a Member of the Council could subsequently be repudiated by their Governments; finally, he made an earnest appeal to the Hungarian Government to find an amicable solution of the controversy.

The Hungarian Government did not, however, accept this suggestion and instructed its representative to state the Hungarian case before the Council at its meeting of July 5th, 1923. At this same meeting, the Roumanian representative explained why the Council should maintain the agreement signed at Brussels.

The Council — with the exception of the Hungarian delegate who refrained from voting — unanimously adopted the resolution drafted at Brussels on May 27th, and took note of the declarations made by the Parties on the substance of the question. Thus, the point of view upheld by the Roumanian Government was given full satisfaction.

The Hungarian nationals of Transylvania, however, did not consider the matter closed. They therefore applied to the Roumanian-Hungarian Mixed Arbitral Tribunal sitting in Paris and created in execution of Article 239 of the Treaty of Trianon. They claimed the restitution of their land or a sum, by way of compensation, the amount of which would be fixed after discussion.

The Jurists for the Roumanian Government pleaded in opposition the incompetence of the Tribunal, which, under the terms of the Treaty of Trianon was qualified only to hear and determine certain claims, which in no way included the case presented by the Hungarian Government.

The hearing lasted from December 15th to 23rd, 1926, and by its resolution of January 10th, 1927, the Tribunal, relying on paragraph 3 of Article 250, declared itself competent in the matter.

The Roumanian Government entered a protest and, by a note dated February 24th, 1927, addressed to the President of the Tribunal, informed the latter that it withdrew its representative; later, on March 7th, 1927, it laid the matter before the Council of the League of Nations in application of paragraph 2 of Article 11 of the Covenant. The Hungarian Government requested the Council to appoint two deputy members for the Roumanian-Hungarian Mixed Arbitral Tribunal to enable the latter to continue its work.

The President of the Council, after having heard both Parties, stated that the fact that the Roumanian Government had raised this question on the basis of Article 11 of the Covenant was evidence of the high importance which that Government itself attached to it; that the matter was more serious than a dispute between two Members of the League since the point at issue was that of the competence of arbitral tribunals in relation to national and international laws on the same subject; he added that it was necessary to go thoroughly into the question and, with that object in view, he proposed the appointment of a rapporteur to study the question in detail and to report to the Council. He asked Sir Austen Chamberlain to be kind enough to undertake that duty. Sir Austen Chamberlain accepted but asked the Council to appoint two of his colleagues to act with him in order, he explained, to give the report all the more

influence and authority. The Chilian and Japanese representatives were appointed to assist Sir Austen Chamberlain.

This Committee of three Members thought it its duty to try all possible means of reaching a final solution of the dispute by conciliation. It met on several occasions in an endeavour to find a formula acceptable to both Parties but its hopes were disappointed.

After examining certain points of law and after having consulted eminent jurists on these points, the Committee laid down the three following principles which in its opinion should be accepted by Roumania and Hungary as signatories of the Treaty of Trianon :

1) The provisions of the peace settlement effected after the war of 1914-1918 do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform;

2) There must be no inequality between Roumanians and Hungarians either in the terms of the agrarian law or in the way in which it is enforced;

3) The words *retention* and *liquidation* mentioned in Article 250, which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territories and in so far as such owner is a Hungarian national.

In consequence, the Committee suggested that the Council should make the followings recommendations :

a) To request the two Parties to conform to the three principles enumerated above;

b) To request Roumania to reinstate her judge on the Mixed Arbitral Tribunal.

The Committee concluded its report by suggesting the appropriate measures in the event of the refusal of the above recommendations by one or other of the Parties.

After a prolonged discussion before the Council, the latter, on the proposal of the President, adopted the conclusions of the

report. It further decided that the recommendations therein suggested should be submitted to the interested Governments for examination and that these Governments should be asked to conform to the principles therein formulated.

The points of law to be considered.

From the foregoing it will be seen that, strictly speaking, there are now no questions of law to be elucidated; those that arise have, in fact, already been discussed either by the lawyers of the Parties or by the Committee of the Council after consideration of the Jurist' report.

We think, however, that the three following questions should be considered, at least in a general manner, as they dominate the issue and are of a nature to place the Hungarian claim in its true light :

a) What is the status of foreigners within the territory of another State, according to the principles of present international law; and to what extent can they or their Governments sue that State for damages, effective or otherwise, suffered in that territory?

b) Does the application of the Roumanian agrarian laws in Transylvania imply spoliation, liquidation or even an act of disfavour towards Hungarian optants who owned property in that province?

c) What is the value of the decision whereby the Mixed Arbitral Tribunal declared itself competent to hear and determine claims submitted by Hungarian optants?

What is the status of foreigners within the territory of another State, according to the principles of present international law; and to what extent can they or their Governments sue that State for damages, effective or otherwise, suffered in that territory?

This aspect of the problem was not, strictly speaking, discussed during the proceedings; but it certainly merits consideration not only because it elucidates the second point but also because the partisans of Hungary have in various Press

articles endeavoured to show that the Hungarian optants are right.

One of the features of our time is the great number of foreigners residing in certain countries, either with the intention of establishing themselves there permanently, as in the States of America, or with the intention of remaining there only temporarily, as is the case in several European countries.

This feature has a great repercussion on international law for, owing to the innumerable problems it gives rise to, it is necessary to revise or define the existing principles regarding the status of foreigners, or to establish special rules to meet the new situations.

What are the principles in force in this connection? M. de Lapradelle, an eminent authority on international questions and Professor at the Faculty of Law, expressed the following opinion in an article published in *Le Temps* of September 5th, 1926, on the question of the Hungarian claims :

> "There is an indisputable principle in international law, which has frequently been asserted in doctrine and jurisprudence, to the effect that the treatment of a foreigner is not judged by that applied to a national but directly by the requirements of the human personality and international life; it may thus be either more or less favourable according to the standard of local civilisation."

We do not agree with that opinion. The principle which it formulates is too absolute in character.

In the present issue, we are dealing with a question regarding which there has been established *no universal and absolute principle or equal juridical treatment.*

The conditions of civilisation and the geographical and social conditions ruling in the different continents or even in the different regions of a given continent play an extremely important part in this matter. In point of fact, during the XIXth century, the Western civilised States (European States and America) claimed, in this question of the status of foreigners, that their nationals living in the Eastern civilised States (Turkey, Asiatic countries) should have the same status as they had in their own territory; in other words, that foreigners in these (Eastern) countries should

enjoy rights which were not held by the natives. The claims have sometimes formed the subject of special treaties known as "capitulations". This preferential status has always been looked upon with disfavour by the Eastern civilised countries. The national awakening that has manifested itself in the last few years, particularly in the far East, and which is characterised by the hatred of foreigners, is chiefly the result of the preferential status of the latter.

In the reciprocal relations between the civilised countries of the West, this question of the status of foreigners was exclusively a matter of internal legislation. European countries and the States of America have always taken and still continue to take a different view on this subject. Until about fifty years ago, under the legislation of practically every European country, a foreigner — even a subject of a western civilised country — was in a position manifestly inferior to that of a national; in particular, he was not permitted to own immovable property. To-day, although he enjoys a higher status, that status is still inferior to that of a national of the country in which he has elected domicile.

In America, however, the situation is different. These States obtained their independence more than a century ago and ever since then a foreigner has held the same civil rights as a national; he is entitled to plead these rights before the same authorities in the same form and in the same conditions as a national without any restriction whatsoever (there is no *judicatum solvi surety*). But there is one important point to be noted : the States of America have never, *in any instance or for any reason whatsoever*, allowed a foreigner to hold more rights than a national. Foreigners and nationals have exactly the same status and the country of which such foreigners are nationals cannot intervene on their behalf unless the legislation of the State in which they are residing precludes them from appealing to the legal authorities or unless the latter have treated them with manifest unfairness, particularly on account of their foreign nationality (refusal of justice).

If foreigners residing in America cannot for any reason or under any circumstances enjoy a more favourable position than nationals, the same is true, *a fortiori*, in European countries.

If foreigners were permitted to hold more rights than the

nationals of the country which has given them hospitality, this preferential status would constitute an offence against the nationals. This would be particularly the case if a country compensated foreigners and refused to grant the same compensation to its nationals; it would thereby be guilty of an injustice towards the latter, who would be quite justified in claiming such compensation.

The same principle should hold good when a foreigner has suffered loss as a result of the enactments of his country of residence. If the country of which he is a national could lodge a complaint whenever such loss had occurred, the States would no longer have sovereign power in their own territory; in last resort, their actions would almost invariably be subject to a foreign authority which would judge of their legality. No State is prepared to accept consequences of such a nature.

Furthermore, in special cases, the most civilised countries may enact laws or introduce measures which, in normal times, would be regarded as a violation of the protection of citizens or as an attack on individual interests. Such, for example, are the laws enacted in time of war, which limit freedom of transit, impose special conditions on foreigners, grant moratoriums to debtors, make paper money forced currency, etc... Enactments of this nature can never form the subject of a claim.

Finally, there may be laws which are directly prejudicial to the interests of foreigners, who have no right of appeal when these laws are introduced for reasons of social welfare or in the general interest of the country; such, for example, are the laws which prohibit foreigners from holding property in certain regions of the country, notably on the frontier. This, moreover, is the custom in several European countries. But, here again, no claim could be admitted.

The State therefore cannot be held responsible in regard to a foreigner unless the law enacted by it tends *directly* to cause him damage *as a foreigner* and *without justification on the grounds of general interest.*

According to the conditions of contemporary international life, the principles which are generally recognised in regard to the status of foreigners are as follows : a foreigner shall have, in his country of residence, the same status as a national; that is to say, he shall hold the same rights as a national and shall have the

same obligations. The State of which the foreigner is a national can intervene on his behalf only in the following special cases, namely :

a) When the State against which the complaint is preferred is of a lesser degree of civilisation as compared with average civilisation of Western countries and disregards certain fundamental rights of individuals;

b) When, although having a standard of Western civilisation, it falls into a state of anarchy or establishes a régime of violence which is condemned by civilised nations and seriously offends the rights of foreigners;

c) When there is a breach of conventional obligations;

d) When, as a result of the legislation of the country, it is impossible for a foreigner to appeal to the local authorities and is treated with manifest injustice, particularly on account of his foreign nationality.

This question of responsibility of States was discussed at the last session of the Institute of International Law which was recently held at Lausanne. We will not deal here with the manner in which the Institute dealt with that question, but the foregoing conditions are in full agreement with the resolutions adopted at Lausanne in this connection. Were this not the case, no State would be prepared to accept them.

If we apply the above conditions to the present controversy, it will be seen that the Roumanian Government has violated no principle of international law in regard to Hungarian optants in the application of its agrarian laws and that, in consequence, there is no justification for the Hungarian Government's request in the matter.

DOES THE APPLICATION OF THE ROUMANIAN AGRARIAN LAWS IN TRANSYLVANIA IMPLY SPOLIATION, LIQUIDATION OR EVEN AN ACT OF DISFAVOUR TOWARDS HUNGARIAN OPTANTS WHO OWNED PROPERTY IN THAT PROVINCE?

Although the reply to this question has already been given in the preceding observations, we wish specially to examine this point. It may be divided into two parts :

a) With what object in view did the Roumanian Government enact the agrarian laws?

b) Considering their object and scope, did the said laws constitute an act of spoliation, a liquidation or even an act of disfavour towards the Hungarian optants?

1. Certain European countries which, in the past, were placed in the same position as Roumania as regards the distribution of landed property, resorted to more or less drastic measures to remedy this state of affairs, since normal or moderate measures would have been inadequate in view of the object to be attained.

Since the memorable night of August 4th, 1789, and especially at the present time, it is universally agreed that the interests of large landowners should give precedence to the general interest of the country. This is one of the most important instances of the application of what is called *social justice*. Roumania has also realised the necessity of following that course.

The object of the agrarian laws enacted by Roumania was therefore to settle a problem of vital social interest to the country, a problem which affected not only her domestic peace but also her present and future economic development.

In view of the fact that these laws were enacted with the object of furthering social and general interests, they bear the seal of morality, for in matters of internal policy, any measure introduced in the national interest is moral, in the same way that anything undertaken for reasons of general welfare in external relations is moral.

2. Furthermore, the Roumanian agrarian laws are of a general character since they apply to Roumanian territory in its entirety and to all persons or property residing or situated therein. These are the characteristics of general laws.

Granted the two conditions enumerated above, it cannot be said that the Roumanian agrarian laws were in the nature of a spoliation or even that they gave rise to unequal treatment in regard to nationals of other countries. This criticism could not have been levelled at the laws even if certain persons — nationals or foreigners — had had to suffer the consequences more than others. The character of a measure is determined by the *object in view* and not by its repercussion, more or less serious, on certain persons whom it was not specially intended to affect. If

the measure is taken in the general interest, there can be no question of an exceptional measure and still less of spoliation.

In the Brussels Agreement referred to above, the Hungarian Government recognised the legitimacy of the Roumanian procedure; even if the Hungarian representative was not sufficiently authorised to sign this agreement, the value of his acquiescence is in no way diminished.

Further, at its session held on September 17th, 1927, at Geneva, the Council of the League of Nations acted fully in accordance with the principles of justice and equity in formulating the three principles which it laid down and which were rendered obligatory for Roumania and Hungary by the Treaty of Trianon.

WHAT IS THE VALUE OF THE DECISION WHEREBY THE MIXED ARBITRAL TRIBUNAL DECLARED ITSELF COMPETENT TO HEAR AND DETERMINE CLAIMS SUBMITTED BY HUNGARIAN OPTANTS?

The fundamental rule in the matter of international arbitral jurisdiction is that the judges or tribunals are only competent to hear and determine questions expressly submitted to them by the parties. The will of the parties is here the fundamental law.

The Mixed Tribunals owe their existence solely to this will of the parties and consequently have no other functions than those expressly assigned to them. For any other questions, even connected questions, they have absolutely no jurisdiction; it may be asserted categorically that, in that respect, the Tribunals *are inexistent*. In consequence, there is no necessity for the parties to refuse to accept the jurisdiction of the Tribunals; they can purely and simply disregard them.

In case of doubt, the Tribunal can of course decide as to its own competence, by interpreting the will of the parties. But when its competence is obvious, the resolution which it takes in declaring itself competent is valueless since it is then guilty of a veritable usurpation of powers.

If the Tribunal gives an award on questions outside its jurisdiction, the parties are free to accept or to reject it. International jurisprudence is entirely in agreement on that point. There have been several very important cases in which one of the parties has refused to carry out the award because it did not fall within the express and definite wording of the terms of

submission, notwithstanding the fact that it remained within the limits of the controversy. In this connection, special mention should be made of the refusal by the American Senate to accept the arbitral award given by the King of Holland on January 10th, 1831, in a frontier question between England and the United States.

The Mixed Arbitral Tribunal, set up under the Treaty of Trianon (Article 239) was constituted exclusively to examine cases of war liquidation expressly referred to by the said Treaty and bearing no relation to agrarian reform, social or general measures, conceived long before the advent of the Treaty. Its competence extends no further.

Consequently, the declaration by the Mixed Arbitral Tribunal to the effect that it is competent to hear and determine the Hungarian claim is entirely valueless. It should be regarded as inexistent.

THE COMPETENCE OF THE COUNCIL OF THE LEAGUE OF NATIONS.

There remains yet another question to be examined. What is the competence of the Council of the League of Nations in the question at present before us? What recommendations can it put forward? What solutions can it suggest in case the parties should fail to reach an agreement as it has asked them to do?

In order to reply to these questions, we must examine the nature of the Council, the rôle it plays, its duties and the criteria which guide it in solving the questions submitted to it.

Owing to the ever-increasing interdependence of States in the XIXth century, the necessity for an organisation to watch over general interests and the maintenance of peace began to assert itself. This organisation found its being in the union of the Great Powers before the Great War, and in the Council of the League of Nations after the formation of the latter.

According to the spirit of the Covenant, the "European Union" was to disappear and a collective policy, which was formerly a monopoly of the Great Powers was to become universal, that is to say, exercised by the League of Nations either by all its Members meeting in Assembly or by the Council.

According to the provisions of the Covenant, the Council is primarily a political organisation.

The rôle of the Council, even for questions of a delicate nature, is chiefly that of a mediator (Articles 12 and 15 of the Covenant). But its rôle is even more important, as will be seen later. In the concrete case here examined, these properties of the Council were emphasized by the rapporteur, Sir Austen Chamberlain. In his report submitted to the Council on September 17th, 1927, he stated that the Council could not confine itself simply to the election of two deputy members for the Mixed Arbitral Tribunal : "if it did so, *it would have failed to discharge its political duties as a mediator and conciliator* in a dispute which extended far beyond the actual terms in which it had been originally submitted by the two parties."

This, moreover, was the attitude adopted by the Council in all questions referred to it.

But its rôle is even still more important. Under Article 11 of the Covenant, the Council is competent to take any action effectually to safeguard the peace of nations, and the second paragraph declares :

> "It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends".

Finally, Article 12 adds :

> "The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council..."

Owing to the character of the Council, its rôle and prerogatives, the criteria which guide it are not of a juridical nature, the latter being frequently based on abstract logic or pervaded with the idea of absolute justice. It is especially and primarily inspired by political criteria, which take into consideration all

the aspects of a question, particularly *the economic, social and political aspects and the reasons of expediency*. In short it follows the principle of social justice. It concentrates on the general interests of peace, interests which take precedence over all other considerations, and to attain that objective it can even depart from juridical rules if it deems proper to do so.

The Council asserted these principles in a famous case which was referred to it : the Italian-Greek dispute. Certain of its members even frankly declared that they were quite unacquainted with international law (Declarations by Lord Robert Cecil; cf. report of the 26th session of the Council, meeting of September 22nd, 1923).

This criterium has dominated all the decisions taken by the Council in questions submitted to it, notably in the question of the Aaland Islands, the case of Upper Silesia, the Greco-Bulgarian dispute and the Mosul incident.

The above-mentioned report by Sir Austen Chamberlain also supports this same view. He stated that it was impossible for the Committee which had been appointed :

> "to take a purely and strictly legal view of the Council's duties, especially as it realised that the election of the two deputy members would not have finally ended a difference which had been successively submitted to three international authorities. On the contrary, it attempted on more than one occasion to bring about a general settlement which would have terminated the controversy and led to better feelings". (47th session of the Council, meeting of September 17th, 1927.)

According to the foregoing observations, the Council is competent to hear and determine the Roumanian-Hungarian dispute under Article 11 of the Covenant. It can recommend to the Parties any means it deems appropriate to bring about better feelings between them. The recommendations which it made at the last session are of a nature to bring about that result.

Finally, if the Parties fail to arrive at an agreement, the Council can take any resolutions deemed proper in the circumstances.

CONCLUSIONS.

Consequently, and for the reasons set forth above, we are of the opinion :

1) That the application of the Roumanian agrarian laws to the property of Hungarian nationals in Transylvania does not fall to be dealt with under the provisions of Article 250 or of any other Article of the Treaty of Trianon;

2) That, in imposing the conditions of its agrarian laws on the said Hungarian nationals the Roumanian Government acted in the full exercise of its sovereignty, committed no act of spoliation towards these nationals and violated no principle of international law;

3) That if it were obliged to compensate the said Hungarian nationals, the Roumanian Government would thereby be according them preferential treatment which is in no way justified and which has never been in the intention even of the Hungarian Government itself, since it declared (note of February 1920) that all it claimed for its nationals was equality of treatment. If such compensation were granted, justice would require that it be granted also to every inhabitant of the Kingdom — nationals or foreigners — to whom the Roumanian agrarian laws have been applied.

The ideas contained in these three conclusions have moreover been expressly recognised by the Committee of the Council and accepted by the Council as being the principles which became obligatory for both Parties when they signed the Treaty of Trianon;

4) That the Mixed Arbitral Tribunal, constituted under the Treaty of Trianon and given a strictly defined mission, is not competent to hear and determine claims submitted by Hungarian optants concerning damages which they allege to have suffered as a result of the application of the Roumanian agrarian laws, and that the resolution voted by the said Tribunal should be considered as null and void;

5) That if, in response to the request of the Council of the League of Nations, the Roumanian Government reinstated its judge on the Mixed Arbitral Tribunal, it must be fully under-

stood that it is solely in order to hear and determine claims coming within its competence and not those relating to the agrarian laws;

6) That there is no necessity to ask for the opinion of the International Court of Justice on questions examined by the Committee of Three appointed by the Council — as requested by the Hungarian Government — in view of the fact that, notwithstanding a certain juridical aspect of the problem, it cannot be denied that the Council has before it a question which is of an essentially political character. Moreover, it must be borne in mind that, after having thoroughly studied the problem itself, the Council considered it expedient to consult absolutely impartial authorities of the highest international reputation and of undeniable juridical competence. By so doing, the Council wished to arm itself with every necessary guarantee. It has given proof of extreme prudence although it was in no way obliged to follow that procedure. In these conditions, it may be categorically asserted that the Council is under no obligation whatsoever to seek any further advice on the question herein examined.

Opinion for the Roumanian State [1]

By

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The application of the Roumanian agrarian laws resulted in the expropriation of many properties situated in Transylvania belonging to Hungarian nationals.

Invoking Article 250 of the Treaty of Trianon, these Hungarians instituted proceedings before the Roumanian-Hungarian Mixed Arbitral Tribunal for restitution and compensation.

Roumania pleaded the incompetence of the Mixed Arbitral Tribunal. Article 250 of the Treaty of Trianon in fact is for the purpose of guaranteeing Hungarian nationals against retention and liquidation carried out as war measures and not against the consequences of laws which constitute the common law of the Roumanian State.

The plea of incompetence has been rejected. Consequently, Roumania, the defendant, refusing to plead the substance of the question withdrew her arbitrator from the Mixed Arbitral Tribunal thus rendering it impossible for that body to give an award on the substance of the dispute.

The affair was laid before the Council of the League of Nations simultaneously by the Roumanian Government and by the Hungarian Government.

On this occasion, the Roumanian Government exercised the friendly right conferred by Article 11, paragraph 2 of the Covenant on each Member of the League "to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations....." It wished to avoid

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(*) Translated from the French version.

being accused of having disregarded the obligations assumed in the Mixed Arbitral Tribunal.

The Hungarian Government invoked Article 239 of the Treaty. It requested the Council to appoint two members to the Tribunal from among whom to choose a judge to fill the vacancy caused by the withdrawal of the Roumanian arbitrator.

This gave rise to the two following questions :

Question 1. — Is the Council of the League of Nations obliged to appoint the two arbitrators requested by the Hungarians ?

Question 2. — If the Council of the League of Nations does not comply with the Hungarian request, what measures can it take to settle the dispute and to what extent will those measures apply to the parties to the dispute ?

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Question 1. — Is the Council obliged to ensure the functioning of the Mixed Arbitral Tribunal by making the choice of a third judge possible ?

A literal interpretation of Article 239 a) of the Treaty calls for a reply in the negative. This Article reads as follows :

> Article 239 *a*). — "Within three months from the coming " into force of the present Treaty, a Mixed Arbitral Tribunal " shall be established between each of the Allied and Asso- " ciated Powers on the one hand and Hungary on the other " hand. Each such Tribunal shall consist of three members. " Each of the Governments concerned shall appoint one of " these members. The President shall be chosen by " agreement between the two Governmnts concerned.
>
> " *In case of failure to reach agreement*, the President of " the Tribunal and two other persons, either of whom may " in case of need take his place, shall be chosen by the Coun- " cil of the League of Nations....
>
> " If in case there is a vacancy a Government does not " proceed within a period of one month to appoint as pro- " vided above a member of the Tribunal, such member " shall be chosen by the other Government from the two " persons mentioned above other than the President...."

In fact, the Roumanian-Hungarian Mixed Arbitral Tribunal was constituted in accordance with paragraph 1 of this text. Agreement was reached for the appointment of the President. The Council of the League of Nations was therefore not called upon to intervene in order to appoint at the same time as an unofficial President, two other persons either of whom might in case of need take the place of the defaulting members.

Without doubt, the withdrawal of the Roumanian representative caused a vacancy within the Tribunal, a case provided for and settled by paragraph 3. The Roumanians fully intend this vacancy to remain unfilled since they plead that the Mixed Arbitral Tribunal is incompetent to judge the questions submitted to it by the Hungarians. Paragraph 3 of Article 239 says indeed that in case there is a vacancy the member intended to fill that vacancy shall be chosen by the other Government from the two persons chosen to take the place of the President in case of need. In the case under consideration these two persons do not exist : the occasion to appoint them has not arisen, and it is not clear under what text of the Treaty the Council of the League of Nations would be obliged or even able to appoint them.

It may be said that Article 239 is incomplete and inadequate by not having furnished a solution to all difficulties which might arise. Granted ! It none the less, by its definite and restricted language, constitutes the law of the parties. We can deduce from it only the obligations which it imposes on one of the parties and the rights which it confers on the other.

The Roumanian Government cannot be obliged to retain an arbitrator to pronounce on disputes which are outside the terms of reference and the competence (limited by the treaties) of the Mixed Arbitral Tribunal. The Hungarians, it is true, maintain the contrary and invoke the decision taken in regard to the question of competence as having force of *res judicata*. In reply, we maintain that only decisions on questions referred to them for settlement under the terms of reference, accepted by both parties, have, by arbitral award, the force of *res judicata*. In fact, the authority of the arbitrators rests solely on the agreement of the parties concerned. Now, it is quite impossible to maintain that the parties are in agreement to leave it to the arbitrators ot declare whether the Roumanian common law is or is not applicable to Hungarian nationals owning property in Transylvania ! We are told that this is begging the question

and, that the controversy bears on the meaning of Article 250 of the Treaty of Trianon and, in particular, on the interpretation which renders that Article applicable to the measures of which the Hungarians complain.

Our answer is that no doubt exists as to the meaning of Article 250 ; it presents no ambiguity and gives rise to no controversy. We add, moreover, that the conditions in which the agrarian reform has been applied in Roumania are above suspicion, that the executory provisions of the said laws, applied equally to Roumanians and foreigners irrespective of nationality, have nothing in common with the measures provided for or prohibited in Article 250. A controversy is not created by the mere assertion that it exists. No dispute can be raised between the Hungarian optants and the Roumanian Government within the category of measures submitted to the jurisdiction of the Mixed Arbitral Tribunal.

The Roumanian Government, it is true, did not evade the discussion on the question of competence before the said Tribunal. It acted thus, however, only out of deference and after having warned the judges that it would not agree to discuss the substance of the question. By declaring their competence, it was not for the arbitrators, in fact, to take upon themselves to deal with claims or protests which the parties had by no means agreed to submit to them.

We have said that the literal interpretation of Article 239 a) of the Treaty of Trianon does not sanction the exaction from the Council of the League of Nations of the appointment of two persons in order that the claimants may choose from these two persons a substitute for the Roumanian judge who has been withdrawn.

Assuming that the Council deems itself authorised to do so : even so it could not agree if it were shown that the Mixed Arbitral Tribunal, which has to be completed, is arrogating to itself an exorbitant competence which is compatible neither with the principles of international law, nor with the provisions of the Treaty of Trianon.

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We will here comment on the second question submitted to us : *If the Council of the League of Nations does not accede to the request submitted to it by the Hungarian Government what*

measures can in take to settle the dispute and to what extent will those measures apply to the parties to the dispute ?

Without setting itself up as a court of appeal in regard to the question of competence, the Council of the League of Nations, whose mission and duty it is to make every effort to bring about conciliation, is indisputably qualified to examine the reasons why the Roumanians refuse to accept any award in regard to the substance of the question. If these reasons are decisive, it need only reject the request for the appointment of deputy judges as unjustified. The Hungarian optants, in fact, will be obliged to accept such a decision. There are judges in Roumania who are qualified to deal with any irregularities committed in the application of the agrarian laws. The Hungarian optants are well aware of the fact, since they first submitted their claims and protests to those judges (we will add that out of about 300 cases, 70 were favourably received by the Roumanian courts). Nonsuited on that side by regular decisions, the Hungarian optants, who are now complaining, cannot appeal to the Mixed Arbitral Tribunal because that jurisdiction deals only with disputes arising out of the war (sequestration, retention, liquidation), and not with disputes arising out of the application of ordinary national laws. If, however, the Council of the League of Nations has any scruples, if it has any doubt, in particular, that the said incompetence of the Roumanian-Hungarian Mixed Arbitral Tribunal might adversely affect the authority of these arbitral jurisdictions in general, it may invite the Roumanian Government to fill the vacancy, but only on two conditions. Firstly, that the Hungarian optants previously and formally agree to certain definite rules both on the general principles and on the interpretation of the provisions of the Treaty ; and secondly, that any failure to observe such principles, any departure from this interpretation involves nullity of the award, thereupon found to be an exceeding of powers.

It is this rather more complicated solution which seems to be favoured by the Council of the League of Nations. In practice, the two methods of procedure lead to the same result, the rejection of the claims of the Hungarian optants.

In fact, the reasons why Roumania was unable to grant the Hungarian claims are based precisely on these principles, on these rules, and on this interpretation of text which the Council

of the League of Nations considers to be the dominant factor in the controversy.

In order to explain this statement, we must recall the acts giving rise to these disagreement and summarise the various aspects of the dispute.

To establish the jurisdiction of the Roumanian plea it will suffice to prove :

1) That there can be no doubt as to the legality of the agrarian reform applied within the Kingdom of Roumania ;

2) That no serious controversy can be raised on the meaning of Article 250 of the Treaty Trianon, which the Hungarians are endeavouring to abuse by misinterpreting the scope of that article and vainly cointesting its perfect clearness.

I. — *The agrarian reform in Roumania.*

This reform was introduced before the war. At the end of the XIX century, Roumania and the neighbouring countries were menaced with serious disturbances. The disturbances were provoked by the contrast which existed between the landed wealth of certain large landowners and the condition of the peasants, who form the immense majority of the population. Neither the abolition of serfdom (1864), the efforts made to create small holdings (1881-1889), nor, later, the attempt to organise agricultural credits and the creation of a farmers bank had any serious results. At the end of the Balkan War, half the arable land belonged to a few thousand landowners. The possible acquisition of property by the peasants was merely a theory. In practice, what they held was negligible.

Detailed documents and reliable statistics have been invoked or reproduced in the numerous memoranda dealing with the question. What we must bear in mind is the intention formulated as early as 1913 and introduced into the political programme of M. Bratiano to remedy, by means of a radical agrarian reform, the distressing inequalities which had become a danger for the very stability of social welfare.

This revolution (for it was one) had numerous precedents. It was to consist in the expropriation of the *latifundia* and in their distribution among agricultural labourers. To realise a reform of that immensity, it was moreover necessary to modify the con-

stitution of a Kingdom in which property was declared inviolable. Roumania did not try to evade this necessity ; a Constituent Assembly was convoked. It had just been elected when the war broke out, and the scheme had to be postponed.

It was revived on July 19, 1917, by a modification in Article 19 of the Constitution and immediately after the conclusion of the Armistice, the King himself took the initiative by his famous message, accepted by most of the Roumanian landowners without vain recrimination : "Circumstances", says the message, "once more give us the opportunity to fulfil my promise to you... My Government will carry out constitutional reforms which will ensure universal suffrage to every citizen and the ownership of two million hectares of the large private estates as well as land of the domains of the Crown, the State, hospitals...

"This reform will ensure more justice and gain for all workers in our social and economic life... etc."

The origin of the agrarian reform, therefore, is above suspicion, a fact which cannot be too strongly emphasized. We would state moreover that it was not imposed by the people, by the proletariat, as before the war universal suffrage did not exist in Roumania. The reform was planned, approved and decided upon by men elected by limited suffrage, i.e. by an assembly in which landowners naturally occupied, if not a preponderating, at least an important place.

The agrarian reform which, in given conditions, involved the expropriation of the *latifundia* (and sometimes even of average sized domains) was realised by successive stages, from 1917 to 1921.

We will not stay to criticise the severity of certain measures arising out of this expropriation, or to deplore the fact that coming at the same time as the monetary crisis and the fall of the lei the reform appeared in many cases to impose sacrifices for which the landowners were only very inadequately compensated. Was it not the same in France after the waiving of their feudal rights by the landowners ? Do not works on political economy contain numerous examples of similar cases taken not only from ancient, but from more recent and almost contemporary history ?

Agrarian laws giving rise to expropriations against inadequate compensation have been imposed in Prussia (1811), Austria

(1848). Russia (1861) and even in the United Kingdom when that Kingdom included Ireland.

Was it not of the possibility of similar measures that the authors of the new constitution of the German Empire were thinking when they expressed Article 153 as follows :

> "Expropriation can be carried out only for the good of "the general public and in virtue of legislative measures. "It is made against fair compensation *unless not otherwise "provided for by any law of the Reich.* Any dispute in "regard to the amount of compensation must be submitted to "the ordinary courts, *unless otherwise provided for by the "laws of the Reich.*"

This then is the constitutional legislation of a great State claiming to be one of the first (if not the first), on account of its culture, which makes reservations for the case of a Reich law imposing, for purposes of national welfare, *expropriation without compensation,* in other words, actual confiscation !

We give this example and make this observation only to show how singular, not to say fantastic, were the awards of the Mixed Arbitral Tribunal which state that the application of the Roumanian agrarian laws is exorbitant in what it calls "common international law."

Apart from the origin of these agrarian laws which suffices to protect them from being measures of circumstance created for the confiscation of ex-enemy properties, we note the peculiarity of making no distinction between the nationality of the landed proprietors to whom they apply. They affect Roumanians in the same way as foreigners. The latter do not receive unfavourable treatment, which is really the utmost that can be legitimately claimed by foreigners.

It will doubtless be observed that the conditions of expropriation are not identical throughout the Kingdom. Account had to be taken of the nature of the land to be distributed and of the size of the rural populations to be satisfied. This is why the law does not apply in the same way in Bessarabia as in the former Kingdom and that special provisions were enacted for Transylvania, a mountainous country. The essential point however, is that in each province there is perfect equality of treatment between Roumanian subjects and ex-enemy nationals.

We will therefore take this fact for granted : the agrarian laws

are above suspicion. They can therefore not be regarded as exceptional laws directed, in consequence of or after the war, against Hungarian nationals. They were enacted by Roumania in virtue of her complete internal sovereignty.

A Roumanian newspaper which appeared recently (the *Adeverul* of October 30th, 1927) publishes the frank admission of Count Karolyi, a former Hungarian Minister. M. Karolyi holds that Roumania's right to proceed to such a reform is incontestable. He does not hesitate to state that if he himself had been Governor of Transylvania he would not have been afraid to impose similar sacrifices on the Magyar nobles.

No doubt can exist as to the economic, political, juridical and social character of the agrarian reform. The events of which the Hungarian optants complain are the consequence of the normal application of this reform.

2. — *What is he meaning of Article* 250 ?

We have added that *no ambiguity exists as to the meaning of Article* 250 *of the Treaty of Trianon.* A careful perusal of the text amply proves this. Article 250 provides for exceptions to the application of Article 232 : it has no other object.

What therefore does Article 232 say ?

"a) *The exceptional war measures and measures of transfer* "taken in the territory of the former Kingdom of Hungary with "respect to the property, rights and interests of nationals of "Allied Powers... shall be immediately discontinued or stayed and "the property, rights and interests concerned restored to their "owners...

"b) Subject to any contrary stipulations which may be provided "for in the present Treaty, the Allied and Associated Powers "reserve the right to retain and liquidate all property, rights and "interests which belong to nationals of the former Kingdom of "Hungary... The liquidation shall be carried out in accordance "with the laws of the Allied or Associated State concerned, and "the owner shall not be able to dispose of such property, rights or "interests nor to subject them to any charge without the consent "of that State."

The provisions laid down in this Article are couched in the language of treaties which have terminated a war. We will

summarise them in a few words : measures of sequestration, retention or liquidation can no longer be applied in the conquered countries to the property of nationals of the victorious countries; inversely, the sequestration, retention or liquidation of the property of nationals of the conquered countries may be maintained within the victorious country.

It is this provision, in so far as it inflicts hardships on ex-enemies, that Article 250 suspends in the annexed provinces. Let us see what it says ; it leaves no room for misinterpretation :

> "Notwithstanding the provisions of Article 232, the pro-"perty, rights and interests of Hungarian nationals or com-"panies controlled by them situated in the territories which "formed part of the former Austro-Hungarian Monarchy "shall not be subject to retention or liquidation in accordance "with these provisions.
>
> "Such property, rights and interests shall be restored to "their owners freed from any measure of this kind, or from "any other measure of transfer, compulsory administration "or sequestration, taken since November 3rd, 1918, until "the coming into force of the present Treaty, in the condi-"tion in which they were before the application of the "measures in question."

In reading and quoting this text, we ask how, in good faith, *expropriations carried out in application of agrarian laws* can be possibly confused with the *retention, liquidation or sequestration of ex-enemy property*, that is, with the EXCEPTIONAL WAR MEASURES mentioned in Article 232 against which the Hungarian optants are guaranteed by Article 250.

Has not this latter text specified fairly clearly what it was guaranteeing in saying in its very first lines that it was encroaching on Article 232 and that it freed the property of ex-enemies situated in the ceded territories "FROM RETENTION OR LIQUIDATION IN ACCORDANCE WITH THESE PROVISIONS !"

There are none so deaf as those who won't hear, says the proverb. The wish not to read in Article 250 what is plainly written there is all the more to be condemned on the part of the defendants in that they had only to refer to the preliminary draft of this text to be convinced of its limited scope. Before being finally adopted, the draft of Article 250 was communicated to the

Hungarian representatives. They expressed the desire that the application of the text should be extended and declared contrary *to any measure of expropriation whatsoever* against Hungarian nationals : "We ask", they said, "for a reassuring statement to the effect that no property belonging to our nationals on the territory of the former Austro-Hungarian Monarchy shall be sequestrated, liquidated *or expropriated* by virtue of a legal provision, or by means of a special measure, which does not apply, in the same conditions to the subject of the liquidating State or of the State putting such a measure into force."

The request thus expressed was not granted. It was not even agreed to insert in favour of the ex-enemies the peculiar privilege *that no expropriation was applicable to their property whereas the property of the nationals was liable to this risk.* Let us note further how much more moderate and less unreasonable the demands of the Hungarian Government were then than the claims of the Hungarian optants to-day. It asked only for equality of treatment between Hungarians and Roumanians. This equality was not prejudiced by the application of the Roumanian laws putting into effect the agrarian reform.

Article 250 was not modified ; it retained its very definitely restrictive part, since it appeared necessary to keep the two questions distinct—that of exceptional war measures, and that of expropriation having nothing in common with the consequences of the war. The only concession made to the Hungarians — out of which they are now trying to make capital — consisted of providing the jurisdiction of the Mixed Arbitral Tribunal to deal with any protest against the application of Article 250.

It must be understood, however, that the protests which may be submitted to the Mixed Arbitral Tribunals shall be those regarding measures arising out of exceptional measures of retention, sequestration or liquidation, and not out of any measures of expropriation whatsoever.

Another proof of the bad faith of the Hungarian claimants is supplied by the rejection, which they had to endure, of the claims of the same kind which, in 1922 and 1923, their Government thought fit to submit to the Conference of Ambassadors, and afterwards to the Council of the League of Nations.

The claim of the Hungarian Government in appealing to the Council of the League of Nations was the same then as the optants are now advancing before the Mixed Arbitral Tribunal. Arti-

cle 250, it maintained, protects Hungarian nationals in annexed territory *from all expropriation and confiscation, of whatever nature they may be, or under whatever pretext they may be, applied.* The agrarian law is merely a pretext for dispossessing ex-enemy subjects.

M. Titulesco, the Roumanian representative, put forward the arguments set forth above. He made a clear distinction between categories of acts of which the Hungarians might have to complain. The Council postponed the question to the next session, entrusting M. Adatci, Ambassador, with the task of convoking the parties and reconciling them. The Ambassador was successful in this, and at a conference between the two parties, held in Brussels and recorded in official minutes, the Hungarian representative admitted that "the Treaty of Trianon does not preclude the expropriation of the property of optants for reasons of public welfare, including the social requirements of an agrarian reform." Unfortunately the Hungarian Government, in defiance of all international usage, disavowed its representative at Brussels, and, in particular, Count Emery de Czachi, a former Hungarian Minister for Foreign Affairs, from whom this admission emanated.

This disavowal, against which vehement protests were made, not only by M. Adatci, but by several members of the Council, did not impose upon that eminent Assembly. On July 5th 1923, a unanimous declaration was made, which gave the victory to the Roumanian thesis : "The Council, after examining the report by M. Adatci, dated June 5th 1923..." (which contained the admission, the acquiescence, of the Hungarian Goverment, recorded and signed by the Hungarian Delegate) "approves the report, takes note of the various declarations contained in the Minutes attached thereto..."

But behold the Hungarian optants, who did not consider themselves beaten, reopening the questions once more by devious means — *quousque tandem ?* — and summoning the Roumanian State before the Mixed Arbitral Tribunal, whose ear they seem to have won !

What are the arguments to which the judges could give heed ?

Those recorded in the shorthand accounts of the speeches of the honourable Counsel for the claimants, and included in the reasons for the award on the question of competence, are founded on truncated texts and on principles difficult to defend. Their slenderness is astonishing, their conclusions are disconcerting.

Article 250, it is stated, may be summed up in the following three propositions :

First proposition. — In transferred territory, the nationals of the dismembered State CANNOT BE DEPRIVED OF THEIR PROPERTY BY ANY MEASURE WHATSOEVER unless the Successor State undertakes to pay them the value of it.

Second proposition. — In transferred territory, *the nationals of the dismembered State* CANNOT BE DEPRIVED OF THE RIGHT TO RETAIN THEIR PROPERTY IN KIND.

Third proposition. — In order to ensure the observance of these provisions, in the event of violation being alleged by the nationals of the dismembered State, against the annexing State, the dispute shall be within the competence of the Mixed Arbitral Tribunal (see. Opinion of M. de Lapradelle, *Recueil de la jurisprudence des T. A. M.*, Vol. IV, p. 88).

The first proposition is inexact. To give it a semblance of truth, it is necessary to leave out of the text relied upon all that defines it and limits its bearing. The only measures against which Hungarian nationals in Transylvania are protected are liquidation, retention, sequestration and, in general, *all the war measures mentioned in Article* 232. It is extraordinarily daring to conclude from the fact that ex-enemy property is freed from "*retention or liquidation in accordance with these provisions*" (that is, in accordance with the provisions of Article 232 and the Annex to Section IV) that it is forbidden to deprive ex-enemies of their property *by any measure whatsoever*, including the measures which might normally be applied to nationals.

The second proposition is no sounder. We need not dwell upon the fact that its language is in obvious contradiction with the first ; if the property of Hungarians must be restored to them *in kind*, this means that they cannot even be deprived of it *in return for fair compensation.* This is an unimportant detail which has escaped the honourable Counsel. Less unimportant is the fact that, like the preceding proposition, the second takes for granted that restitution in kind (reserved for property which was wrongfully sequestrated, seized or liquidated by war measures) may be extended to any other cause of expropriation, which is manifestly contrary to the text under interpretation.

The third proposition is only true *in so far as it permits Hungarian optants to defend themselves against the insufficient application of Article* 250, that is against a measure which, in violation of this text, has the character of a retention or a liquidation as a war measure.

The texts are thus elusive — as soon as they are examined with attention — and fail to supply the claimants with the support which they expect.

The same applies to the principles which are invoked and which the awards on competence have nevertheless thought fit to rely on.

The principle which forms, as it were, the *leitmotiv* of the arguments of the Hungarian optants, is the rule habitually accepted by all civilised States — including Roumania — of the sanctity of property. The peculiar conclusion is drawn that any prejudice to property is contrary *to common international law and cannot find a place in a peace treaty !*

This conception of a *common international law*, that is, of an internal law which is binding on all civilised nations and confers a sort of acquired right on those who enjoy it, is new. It is so exorbitant, so extravagant, one might say, that it is sufficient to discredit the cause on behalf of which it is invoked.

Will anyone dare to maintain that States which are sovereign as regards the rules of conduct which, within their territory, they can impose on their citizens in conformity with the national will, are obliged to be more restrained and less free with regard to the foreigners whom they shelter?

There have, at all times, been discussions as to what could or should be the status of aliens. The greater facility of communication, the development of cosmopolitanism, the multiplication of international exchanges, have had the happy result of gradually doing away with most of the differences which are made practically everywhere between the status of nationals and that of foreigners. The States of the New World, which are the most liberal, abolish all differences once the foreigners have been considered *digni intrare*. — But it is paradoxical to maintain that in countries of the same civilisation, circumstances can arise which authorise foreigners to demand more guarantees than nationals ! Let us not obscure the issue by bringing in arguments which can only be applied when it is a question of determining relations with races of a very different civilisation (like

the Far East) or a very inferior one (like Central Africa). This is obviously what our colleague de Lapradelle did in referring, in a political newspaper (*Le Temps* of September 5th, 1926), in connection with the Roumanian-Hungarian conflict, to the fact that "the treatment of the foreigner cannot always be measured by that "of the national, but must be measured directly by the exigencies "of human personality and of international life." Applied to the relations between European nations, propounded as a definite principle, this assertion is pure sophistry. It is not sufficient to make the conception carry conviction that foreigners can, in any country whatsoever, by relying on a so-called "common international law", demand, as an acquired right, a benefit which the nationals cannot enjoy.

Besides, what will this "common international law" be, and how is its scope to be defined? Does it follow from the fact that the laws of all countries of western civilisation include the régime of property and the subordination of expropriation to fair compensation made in advance, that no exception—of whatever kind — can be made to the rule ? I mentioned above the history of the agrarian laws in Roumania. I spoke of the new German Constitution and the reservation which it makes in the event of the Reich's imposing, by law, measures of expropriation without compensation. It is impossible to deny — even if one were to admit that the generalisation of a principle or a legal régime makes it a "rule of common international law" — that it is also common international law that a legislative measure, in conformity with the constitution of the country in which it is passed, is sufficient to make a breach in the common régime, through which the so-called acquired rights of foreigners will go by the board together with the rigths which the nationals previously enjoyed.

Let us be done with these confused conceptions, these dangerous innovations. The general principles which the Roumanians can certainly oppose to the argument of "common international law" are those granting to each State the right to determine its national legislation in its own way, to impose both on its nationals and on the foreigners admitted to its territory any rules of conduct which it may please the legitimate authority to enact. It is with full powers that the legislators of any country subject the régime of property, inheritance, contracts and, in general, all the juridical relations of their citizens and their subjects, to any procedure which they may deem reasonable and expedient.

The Roumanians have deemed the agrarian laws expedient. It is constantly acknowledged that the sacrifice which they imposed on the proprietors of the *latifundia* has spared them a revolution. If they were mistaken in the methods employed, that is not the business of any foreigner.

What the texts tell us is that the Roumanians have not retained the right to apply to the Hungarian nationals in the annexed provinces the WAR MEASURES (sequestration, retention or liquidation) provided for in Article 232 b ; — that a Roumanian-Hungarian Mixed Arbitral Tribunal is institued to take cognisance, within limits, of complaints which may be brought by Hungarians in the event of a violation of the Treaty, that is, if directly or indirectly war measures (retention, liquidation or sequestration) have been applied to them as ex-enemies ; — that the Mixed Arbitral Tribunal has no competence, and can assume none under pretext of verifying its competence, to pronounce on acts which do not constitute acts of war and are on no score exceptional war measures applicable to ex-enemies alone.

These considerations, these principles, these texts have not convinced the Mixed Arbitral Tribunal. We know the sequel.

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The Council of the League of Nations appointed a committee of three members, with Sir Austen Chamberlain as rapporteur, to study the whole affair. The report read at the Council meeting of September 17th was entirely favourable to the cause of the Roumanian Government. It first stated that it was impossible for the Council to accede to the request for the nomination of deputy-arbitrators. If it confined itself simply to the election of the two deputy members for whom Hungary had asked, the Com- " mittee would have failed to discharge its political duties as a " mediator and a conciliator in a dispute which extended far " beyond the actual terms in which it had been originally sub- " mitted by the two parties." The Committee of Three then asked itself the following questions.

1) Is the Roumano-Hungarian Mixed Arbitral Tribunal entitled to entertain claims arising out of the application of the Roumanian Agrarian Law to Hungarian optants and nationals?

2) If so, to what extent and in what circumstances is it entitled to do so?

These questions were submitted to eminent legal authorities, who were unanimous in solving them in the sense which we have indicated above.

" If it could be established in any particular case that the " property of a Hungarian national suffered retention or liqui- " dation or any other measure of disposal under the terms of " Articles 232 and 250 as a result of the application to the said " property of the Roumanian agrarian law and if a claim were " submitted with a view to obtaining restitution, it would be " within the jurisdiction of the Mixed Arbitral Tribunal to give " relief." — But three principles were bound to dominate the whole discussion and the report expresses them as follows :

1) The provisions of the peace settlement effected after the war of 1914-18 *do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.*

2) There must be no inequality between Roumanians and Hungarians, either in the terms of the agrarian law or in the way in which it is enforced.

3)The words "retention and liquidation" mentioned in Article 250, which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territories *and in so far as such owner is a Hungarian national.*

The rapporteur followed up these three principles with a twofold recommendation, and considered the different results which would follow the acceptance or the refusal by the parties, or by one of them, to accept these proposals : *a*) the request that the two Parties should conform to the principles enumerated above ; *b*) the request that Roumania should reinstate her judge on the Mixed Arbitral Tribunal.

" In the event of a refusal by Hungary, the Committee considers " that the Council would not be justified in appointing two " deputy members in accordance with Article 239 of the Treaty " of Trianon."

" In the event of a refusal by Roumania, in spite of the " acceptance by Hungary of the above proposals, the Committee " considers that the Council would be justified in taking appro-

" priate measures to ensure in any case the satisfactory working " of the Mixed Arbitral Tribunal.

" In the event of refusal of the above recommendations by " both parties the Committee considers that the Council will " have discharged the duty laid upon it by Article 11 of the " Covenant."

The Council, after a very keen discussion, in which the two points of view were defended, on either side, with the greatest skill and vehemence — the Hungarian point of view by Count Apponyi, the Roumanian point of view by M Titulesco — decided to adopt the three principles enunciated, but abstained from adding the twofold recommendation which was the only thing capable of putting an end to the dispute. The decision to be taken was adjourned until December.

It is already certain, however, that Hungary rejects the suggestions of the Council, while Roumania accepts them — conditionally, of course — since the reinstatement of the Roumanian judge on the Mixed Arbitral Tribunal could only be allowed if the decision of the Tribunal is made contingent on the acceptance of the three principles laid down.

It has been suggested — although timidly — that the opinion of the Permanent Court of The Hague should be requested. The decision to be taken on this point has also been postponed until December. We do not consider, moreover, that the request for the opinion of the Permanent Court can be submitted unless the Council is unanimous, and, in particular, unless *both parties expressly give their consent.*

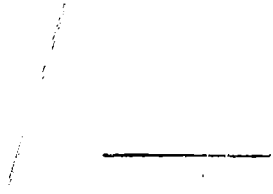
We ourselves can see no reasonable solution of the dispute other than those provided in Sir Austen Chamberlain's most remarkable, precise and perfectly logical report. Is was intended that the two parties should have time to become reconciled.

There can be little hope that Hungary will accept with a good grace the three clear definitions of the Council. If the reconstituted Mixed Arbitral Tribunal is obliged to conform to them, it will be forced to nonsuit the Hungarian optants, none of whom have so far been able to complain of anything but measures in execution of the agrarian laws, without establishing any connection between these measures and those provided for and prohibited by Article 250 of the Treaty of Trianon.

If the Mixed Arbitral Tribunal, in spite of accepting the three

principles recommended to its attention by the Council and accepted by its claimant, were to persist in the reasoning on which it founded its first decision, it would once more be guilty of exceeding its powers, and its award would be null and void, since the decisions of arbitral jurisdictions receive their authority only from the prior adhesion of those who have consented to defer to their judgment, and only in so far as they have consented to do so.

November 10th 1927.



The Case of the Hungarian Optants before the Council of the League of Nations

OPINION

BY

J. L. BRIERLY

Chichele Professor of International Law and Fellow of All Souls College, Oxford

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I am asked to give my opinion on the two questions following :

1) Under Article 11 of the Covenant and Article 239 of the Treaty of Trianon, can the Council refuse to nominate an auxiliary judge ?

21) Should the Council refer to the Permanent Court of Justice at the Hague for an advisory opinion on the rulings which it has suggested to the litigants ?

The controversy between Roumania and Hungary out of which these two questions arise has been protracted and complicated, but the questions addressed to me are specific, and the following passages taken from the report presented by Sir Austen Chamberlain to the Council of the League on September 17th, 1927, contain a non-controversial statement of facts, which is sufficient to explain how the questions arise.

"From December 1923 onwards, a number of applications from Hungarian nationals or optants owning lands in the territories transferred to Roumania were submitted to the secretariat of the

Roumano-Hungarian Mixed Arbitral Tribunal, provided for in Article 239 of the Treaty of Trianon, asking, among other matters, that the Tribunal should declare that the measures restricting their right of ownership, which had been applied to their movable and immovable property by the Roumanian State, were contrary to the provisions of Article 250 of the Treaty of Trianon, and that it should order the Roumanian State to make restitution.

"In 1925, the Roumanian Government submitted applications objecting to the jurisdiction of the Tribunal. After hearing the counsel of the two parties between December 15th and 23rd, 1926, the Tribunal, on January 10th 1927, declared itself competent, in virtue of Article 250, paragraph 3, of the Treaty of Trianon, and called upon the defendant (Roumania) to forward her reply within a period of two months.

"On February 24th, 1927, Roumania informed the Tribunal that she would refrain from submitting her reply regarding the substance of the question and that, consequently, her arbitrator would no longer sit in connection with any of the agrarian matters brought forward by Hungarian nationals. At the same time, she submitted to the Council, in virtue of Article 11, paragraph 2, of the Covenant, a request to allow her to acquaint the Council with the reasons on which her attitude was based.

"This question came before the Council on March 7th, 1927. The Roumanian representative explained the reasons which had led the Roumanian Government to withdraw its arbitrator from the Tribunal.

"The Hungarian representative asked the Council to appoint, in accordance with the Treaty of Peace, two deputy members to enable the Tribunal to continue its work."

Sir Austen Chamberlain went on to state that the Council appointed a Committee of Three, with himself as rapporteur, to examine the question ; that this Committee had failed in its attempts to induce the parties to reach a settlement by methods of conciliation, and had therefore been compelled to undertake, with the assistance of certain eminent legal authorities, an examination of the question of the Mixed Arbitral Tribunal's jurisdiction.

As a result of this examination the Committee defined three

principles which, in their opinion, the acceptance of the Treaty of Trianon had made obligatory for Roumania and Hungary. These principles were :

"1) The provisions of the peace settlement effected after the war of 1914-18 do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.

"2) There must be no inequality between Roumanians and Hungarians, either in the terms of the Agrarian law, or in the way in which it is enforced.

"3) The words 'retention and liquidation' mentioned in Article 250, which relates only to the territories ceded by Hungary, apply solely the measures taken against the property of a Hungarian in the said territories and in so far as such owner is a Hungarian national."

These are the "rulings" referred to in the second question submitted to me.

Question I

The contention of the Hungarian Government on this point may be stated in words used by Count Apponyi in the Council on the 17th September 1927.

"Article 239 of the Treaty of Trianon and the annexed paragraph A lays down absolutely that, in cases where, for some reason, a seat on a Mixed Tribunal becomes vacant, and when the State which had appointed this judge has not, within a period of one month, arranged for his replacement, the Council is to act in accordance with the terms of the same articles of the Treaty, that is to say, it shall appoint two persons who are nationals of countries which were neutral during the war, from which persons the other party shall choose the substitute judge to take the place of the one who has been withdrawn. It is not exact, therefore, to state that we have asked the Council to appoint this judge. We do not ask a favour for ourselves. We have merely stated before the Council that this is an absolute obligation imposed by the Treaty."

In my opinion this argument cannot be sustained for two reasons : 1) it neglects the fact that the Council is seized of the matter under paragraph 11 of the Covenant and 2) it does not correctly state the provisions of Article 239 of the Treaty of Trianon.

Under Article 11 of the Covenant (which is also Article 11 of the Treaty of Trianon), paragraph 2, it is declared "to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends. " It is indisputable that in the present case circumstances "affecting international relations" in the way described have been brought to the attention of the Council ; for this state of things is a fact, whatever view we may hold of the responsibility for it having been brought about, and it is a fact, which the Council, acting under Article 11, clearly cannot neglect. What action, therefore, does the Article prescribe to the Council in an event such as has arisen ? Paragraph 2 contains no specific directions at all ; but in the case dealt with in paragraph 1, of "any war or threat of war", "the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations," and it can hardly be contended that the duty of the Council under paragraph 2 is different. If this is so, it means that the Council is absolutely free to determine, in the light of its own appreciation of all the circumstances, what action is "wise and effectual to safeguard the peace of nations", or in other words that its action is intended to be political and not judicial. Unless therefore it can be said that the discretion conferred by Article 11 is in some way restricted by Article 239, it is clear that the Council *may* refuse to nominate an auxiliary judge, and indeed *must* refuse to do so if it deems that such a nomination would not promote the interests of peace and good understanding.

Does then Article 239 restrict the discretion of the Council under Article 11 ?

To answer this question the following considerations are relevant. In the first place if the words of Article 239 were peremptory, which in fact they are not, there would be a conflict of duties under the same Treaty, between which it would be neces-

sary for the Council to choose. But the duty, if any, under Article 239 is merely incidental to the general functions of the Council; for the Council is there introduced merely as part of the machinery for constituting Mixed Arbitral Tribunals. But the Council is much more than an adjunct of the Mixed Arbitral Tribunals, and its paramount function, which is the promotion of international peace, is contained in the Covenant. If, therefore, the two duties conflict, it is manifestly right that the Council should prefer its duty under Article 11.

Secondly, it is difficult to see how the alleged or any other duty can be imposed on the Council by a Treaty to which many of the States which are members of the Council are not even parties.

Thirdly, in my opinion, it is impossible to read an imperative direction to the Council into the language of Article 239. That Article relates to the constitution of Mixed Arbitral Tribunals between each of the Allied and Associated Powers on the one hand and Hungary on the other hand; and the relevant provisions are these :

"Each such Tribunal shall consist of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments concerned.

"In case of failure to reach agreement, the President of the Tribunal and two other persons, either of whom may in case of need take his place, shall be chosen by the Council of the League of Nations...

"If in case there is a vacancy a Government does not proceed within a period of one month to appoint as provided above a member of the Tribunal, such member shall be chosen by the other Government from the two persons mentioned above other than the President". And paragraph 1 of the Annex to the Article adds :

"Should one of the members of the Tribunal either die, retire, or be unable for any reason whatever to discharge his functions, the same procedure will be followed for filling the vacancy as was followed for appointing him."

The draftsmanship of the Article is curious. It contemplates that the Council should choose a President and two substitute members in a certain event, namely, "in case of failure to reach

agreement", (in the French text the words are "au cas où *cet* accord ne pourrait intervenir"), words which clearly have reference to the possibility that the two parties might fail to agree in the choice of a President. But the event that has happened in the present case is that Roumania has informed the Tribunal that her arbitrator will no longer sit to hear matters arising out of the Roumanian Agrarian reforms. Even if we assume that this Roumanian action has created a "vacancy", all that the Article actually says is that in that event a substitute for the Roumanian member "shall be chosen by the other Government from the two persons mentioned above other than the President", that is to say, from two persons chosen by the Council because of the failure of the parties to reach agreement on the choice of a President, an event which has not occurred. No doubt, *ut res magis valeat quam pereat*, we are entitled to read into the Article a *power* in the Council to nominate the two persons in the event of a vacancy, but when the suggestion is, as here, that the Article imposes, in Count Apponyi's words, an "absolute obligation" on on the Council, it is relevant to point out that the present difficulty is actually, on the terms of the Aricle, a *casus omissus*. At the most it may be said that the Article *assumes* that the Council will appoint the two substitutes; but the mere fact that the Tribunal cannot function unless the Council does so cannot of itself by implication create an obligation on the Council to make the appointments, and no such obligation is contained in the words of the Article.

QUESTION II

The power of the Council to ask for an Advisory Opinion from the Permanent Court arises under Article 14 of the Covenant, which declares, "the Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." The Council therefore has the right, if it thinks fit, to ask for an Advisory Opinion on the rulings which it has suggested to the litigants.

But the question submitted to me is whether the Council "should" do so, and to that the short and sufficient answer appears to me to be that there are no circumstances whatever in which the Council is under an *obligation* to take this course, which can never be more than one among possible alternative

courses for its consideration. In the present case, the Council has presumably hitherto taken the view that this course would not be "wise and effectual to safeguard the peace of nations", and I am not asked to give, and it would be presumptuous in me to offer, any opinion on this view, beyond saying that it is clearly a view which the Council is within its legal rights in taking. In regard to this question, as in regard to Question 1, the Council is bound both by the letter and by the spirit of the Covenant to take whatever course it regards as most likely to conduce to the restoration of a good understanding between the parties.

November 26th, 1927.

Opinion on the Roumanian-Hungarian dispute concerning the Roumanian agrarian reform(*)

BY

Giulio DIENA

Professor at the Royal University of Pavia, Member and Vice-President of the Institute of International Law.

The undersigned Giulio Diena, Professor at the Royal University of Pavia, having been consulted on the two following questions :

Question 1 : « Can the Council of the League of Nations, apprised under Article 11 of the Covenant and Article 239 of the Treaty of Trianon, refuse to appoint a deputy judge for the Roumanian-Hungarian Mixed Arbitral Tribunal ?"

Question 2 : "Should the Council refer to the Permanent Court of International Justice for an opinion on the recommendations which it has suggested to the Parties ?"

Expresses the following opinion :

THE FACTS OF THE CASE

In order to reply to the questions thus submitted, it is first of all necessary to examine the facts which led up to the Roumanian-Hungarian dispute to which these questions relate. We will confine ourselves to giving a very brief summary of these facts, recalling in particular the circumstances of special importance regarding the points of law to be analysed.

(*) Translated from the French version.

As a result of the agrarian laws voted in Roumania involving the expropriation of immovable property, *without any distinction as to the nationality of the owners*, Hungary, in the interest of those owners who had opted for Hungarian nationality, after having unsucoessfully appealed to the Conference of Ambassadors, apprised the Council of the League of Nations in 1923, requesting it *to deal with the substance of the question* and to give a ruling by declaring that the legislative and administrative measures enacted in Roumania in this connection were contrary to the Treaties and that the immovable property of Hungarian optants should be restored to them with full compensation for the damage suffered.

The Council of the League of Nations examined this question in April and July 1923, and having failed to obtain the consent of the Parties to a reference of the matter to the Permanent Court of International Justice, asked the rapporteur, M. Adatci, to act as mediator between the two Powers concerned. With a view to arriving at a settlement the representatives of the latter met at Brussells and opened conversations which terminated in the drafting of minutes on May 27th, 1923, from which it is seen that the Hungarian representatives admitted that *the Treaty of Trianon did not preclude the expropriation of the property of optants for reasons of public welfare.*

The Hungarian Government, however, having disowned its representatives and alleged that no agreement in this matter had been reached, on June 5th, 1923, the Council, after having approved the report drawn up by M. Adatci on these conversations, expressed the hope that the Hungarian Government would do its best to reassure its nationals and that the Roumanian Government would give proof of its goodwill in regard to the interests of the Hungarian optants.

Following this resolution, which was adopted by all the members of the Council with the exception of the Hungarian delegate, a certain number of nationals, Hungarian optants, submitted applications to the Roumanian-Hungarian Mixed Arbitral Tribunal, provided for in Article 239 of the Treaty of Trianon asking it to declare that the measures applied to their property by virtue of the agrarian laws enacted in Roumania were contrary to the provisions of Article 250 of the Treaty of Trianon.

Notwithstanding the plea of incompetence advanced by the Roumanian Government, the Mixed Tribunal, by its decision of

January 10th, 1927, declared itself competent and called upon Roumania to forward her reply on the substance of the question within a period of two months.

On February 24th, 1927, Roumania informed the Tribunal that she would refrain from submitting her reply regarding the substance of the question and that her arbitrator would no longer sit in connection with any of the agrarian matters brought forward by Hungarian nationals. At the same time, Roumania submitted to the Council, in virtue of Article 11, paragraph 2, of the Covenant, a request to allow her to acquaint the Council with the reasons on which her attitude was based.

The Council met on March 7th, 1927, and the Roumanian representative explained the reasons which had led the Roumanian Government to withdraw its arbitrator from the Mixed Tribunal, whereas the Hungarian representative asked the Council to appoint, in accordance with Article 239 of the Treaty of Trianon, two deputy members to enable the Tribunal to continue its work.

The Council thereupon decided to request Sir Austen Chamberlain to report on this question. The rapporteur having expressed the desire that two of his colleagues should be appointed to act with him, a Committee of Three was formed. This Committee made several attempts to bring about an understanding between the Parties but its hopes were completely disappointed. In fact, the Hungarian representative confined himself to renewing the proposal already made to refer the question of the competence of the Mixed Arbitral Tribunal to the Permanent Court of International Justice, a proposal which was not accepted by the Roumanian representative; the latter was prepared to accept certain recommendations suggested by the Committee of Three but these recommendations were rejected by the Hungarian representative.

As will be seen from the report which it submitted to the Council, the Committee was obliged to seek a solution by other methods. After a detailed study of the controversy it came to the conclusion that the question of the competence of the Mixed Arbitral Tribunal was one of primary importance. After examining this question and having it examined by eminent legal authorities it arrived at the conclusion that the limits of the jurisdiction of the Roumanian-Hungarian Mixed Arbitral Tribunal were fixed by Articles 232 and 250 of the Treaty of Trianon. However, to determine the scope of these provisions, in regard

to the case under discussion, the Council considered that it was necessary to lay down the following principles :

1) *The provisions of the peace settlement effected after the war of 1914-1918 do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.*

2) *There must be no inequality between Roumanians and Hungarians, either in the terms of the agrarian law or in the way in which it is enforced.*

3) *The words "retention and liquidation" mentioned in Article 250, which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territories and in so far as such owner is a Hungarian national.*

The Committee therefore suggested that the Council should make the following recommendations :

a) To request the two Parties to conform to the three principles enumerated above ;

b) To request Roumania to reinstate her judge on the Mixed Arbitral Tribunal.

The second part of the report referred to the sanctions to be applied if one or other or both of the Parties rejected these recommendations.

This report was discussed by the Council at its meetings of September 17th and 19th, 1927, and during the four sittings occupied by the discussion, the representatives of the Parties were given every opportunity to explain their points of view. On this occasion, Count Apponyi, on behalf of the Hungarian Government, proposed that the Council should ask the Court at The Hague for an advisory opinion, even on the question as to whether the three principles laid down in the report submitted by the Committtee of Three were really legitimate ; M. Titulesco, on the other hand, stated the reasons for which Roumania was unable to accept such a proposal.

The Council then unanimously approved the report by the Committee of Three—the representatives of the Parties concerned abstained, at the suggestion of the President—and adjourned any

further resolution to the next meeting of the Council, in the hope that Roumania and Hungary would, in the meantime, come to an agreement.

QUESTION I

We have recalled that the Council of the League of Nations, apprised by Roumania in virtue of paragraph 2 of Article 11 of the Covenant, was asked by the Hungarian representative to fill the vacancy on the Roumanian Mixed Arbitral Tribunal caused by Roumania's withdrawal of her judge, in accordance with the terms of Article 239 of the Treaty of Trianon.

In order to decide whether, in case the Parties should fail to reach an agreement, the Council is or is not obliged to grant this request, it is not sufficient to take the said Article into consideration ; account must also be taken of Article 250 of the same Treaty as well as of the provisions of the Covenant, in particular: paragraph 2 of Article 11, cited by Roumania.

For the question under discussion, it is Article 250 that fixes the limits of the competence of the Mixed Arbitral Tribunal. However, the Committee of Three appointed by the Council and the Council itself immediately realised that the question of the competence of the Mixed Arbitral Tribunal was of primary importance in arriving at the solution to be adopted or recommended regarding the dispute laid before the Council.

It is, in fact, obvious that if, by declaring itself competent, the Mixed Arbitral Tribunal has (as the undersigned believes) *exceeded its powers*, the Council in granting Hungary's request would only be encouraging the same Mixed Arbitral Tribunal to exceed its powers in other cases.

If it were objected that the Council is competent neither to revise nor cancel awards given by Mixed Arbitral Tribunals, such an objection would be irrelevant, for the simple reason that Roumania, as shown in the foregoing recital of facts, has never asked the Council to exercise real powers of competence in this respect.

There is no doubt that although the Council is essentially a political organisation there is nothing which precludes it from examining the legal aspects of a given situation or report which has led to a dispute or from acting in accordance with its legal findings. Thus paragraph 8 of Article 15 of the Covenant pro-

vides that: "If the dispute between the parties is claimed by one of them, *and is found by the Council*, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, *the Council shall so report...*"

This proves that the Covenant recognises that the Council is competent to express an opinion also on strictly juridical questions, and this competence stands even if in certain cases, for example : the dispute between Great Britain and France concerning the nationality of their nationals in Protectorates, the Council in fulfilling its mission preferred to ask the Permanent Court of International Justice for an advisory opinion (1).

In any case, we must here take into consideration paragraph 2 of Article 11 of the Covenant on which the request submitted by Roumania to the Council is based. This clause is conceived and drafted in the broadest possible manner in order that the Council may have complete liberty of action as to the methods it may choose for the purpose of maintaining peace and good understanding between nations.

This is generally recognised by the authors, who studied the provisions of the Covenant with a view to their interpretation. If, for example, we refer to the excellent commentary by Messrs. *Schücking* and *Wehberg* (*Die Satzung des Völkerbundes*, 2nd edition, Berlin 1924) we find, on page 469, that these writers recognise that, according to paragraph 2 of Article 11, the measures which are to be regarded as permissible for the Council are not only timely intervention and mediation but also all measures which may appear necessary to maintain peace and good understanding between nations (cf. a similar opinion by Strupp, Elements of International Public Law, French edition published by Rousseau, Paris, 1927, page 306). This view is shared by certain French writers, in particular by Fauchille (*Traité de droit international public*, 8th edition, Part 3, page 668) who, after observing in connection with Article 11 that this clause of the Covenant is extremely vague, adds that "it must be inferred that the Council and the Assembly *are given every latitude regarding the choice of the measures to be taken* ; they may resort to diplomatic me-

(1) M. Henry Rolin, in an article entitled : «*Où en est la Société des Nations*» (Extract from the *Revue Belge* of January 1st and 15th 1927, pages 10-12) while pointing out that *the Council's function of judging disputes* shows a tendency to disappear nevertheless explicitly recognises that this function was assigned to it by the Covenant.

thods, juridical methods or to methods of an essentially political nature such as mediation, the constitution of an international tribunal, *and the appointment of a committee of jurists* vested with international authority." (See also Charles Rousseau, "the competence of the League of Nations in the settlement of international disputes," Paris, published by Pedone, 1927, pages 30-47).

The interpretation was confirmed, if not authoritatively, at least officially, by a report approved by the Committee of the Council on March 17th, 1927, submitted by a small Committee appointed by the League of Nations in connection with the reduction of armaments and instructed to examine and recommend the "appropriate measures to be adopted to expedite the preparation of resolutions to be taken by the Council to give effect to the provisions of the Covenant."

Among the declarations contained in this report is to be found the following : "The procedure opened in virtue of Article 11 in no way excludes that followed under the other provisions of the Covenant." The report also examines the situation that exists when there is no threat of war, or when the case is of no immediate urgency and adopts, *inter alia*, the following resolution: "If the Council considers it necessary for the fulfilment of its duty, it may in certain appropriate cases, *either* ask the Permanent Court for an advisory opinion, *or* by reason of certain special circumstances, obtain *such an opinion from a Committee of jurists appointed by it.*"

It therefore follows that if, with a view to enlightenment, the Council preferred to adopt the second alternative rather than refer the question, as suggested by Hungary, to the Permanent Court of International Justice for an advisory opinion, it was perfectly justified in doing so. It is for the Council alone to judge with entire liberty of action whether, account being taken of the circumstances, one method should be adopted in preference to the other, and it may be added that the circumstances of the present dispute were such that the Council was fully justified in its choice.

Even if Roumania and Hungary failed to reach an agreement, there is no reason why the Council should abandon the attitude which it has adopted. In point of fact, this dispute cannot be submitted to the *jurisdiction* of the Court if one or other of the Parties refuses to give its consent to such a step. It is common

knowledge that in the absence of terms of submission drawn up between the Parties, the jurisdiction of the Court is obligatory only by virtue of a convention previously concluded and having a general character (1); these conditions are lacking in the present case.

It is not however appropriate (as the Council has thought up to the present) that the Council should apply to the Court requesting it to give an advisory opinion. Since, for good reasons, Roumania objects to thie procedure, it cannot be regarded as a measure calculated to guarantee a good understanding between the nations concerned. It is further to be noted that the Roumanian-Hungarian dispute submitted to the Council, although a juridical question, is at the same time, *in the highest degree*, of a *political* nature (2), for whatever may be the solution ultimately adopted, it is apt to have the most far-reaching consequences, not only in the matter of law but also from a political, social and economic point of view. It should also be pointed out that the effect of the solution of the dispute laid before the Council may be of capital importance, even in countries which, by enacting laws similar to those voted in Roumania, have realised an agrarian reform of the same kind. This is proved by an official letter dated September 16th, 1927, signed by Dr. Bénès, in the name of the Czechoslovak Republic, and addressed to the Council when it was dealing with the Roumanian-Hungarian dispute; this letter lays stress on the considerable political, social and economic importance that Czechoslovakia attaches also to the question of her agrarian laws, a question which she very rightly refuses to consider as falling within the competence of the Mixed Arbitral Tribunals.

Furthermore, it must be remembered that an opinion given by the International Court of Justice at the request of the Council has no obligatory force since it is given only as an advisory

(1) Among the numerous references that could be cited in this respect, see for example Bourgois, *The Court of International Justice*, (*Revue de droit international et de legislation comparées*, Brussels, 1921, pages 17 and ff ; especially pp. 28-29) ; Blociszewski : *De la compétence de la Cour permanente de justice internationale* (*Revue générale de droit international public*, Paris, 1922, pages 23 and ff, especially pages 25-27).

(2) In regard to the very serious difficulties encountered in endeavouring clearly to distinguish the juridical from the political questions, reference can be made with advantage to the discussions which took place in the Institute of International Law during the session held at Grenoble in 1922 on the scheme relating to the « Classification of judicable disputes » (*Annuaire de l'Institut* I. 2g (1922) p. 225 and ff).

opinion and the Council is therefore not bound to conform to it (1).

In the present case, however, the Council, after carefully examining the question and after having had it examined by its legal experts from the juridical point of view, must also consider the political consequences involved; it might then conclude that it would not be advisable to adopt the opinion expressed by the Court. The result then would be to diminish the prestige of that great authority, which it is to the interest of all to keep intact and to uphold.

The whole economy of the Covenant, moreover, and particularly of Article 12, points to the conclusion that when the parties are not agreed to submit their dispute to arbitration or to a juridical authority for settlement, it is for the Council to hear and determine the question. This was explicitly admitted by the Hungarian Government itself when in 1923 it laid the matter before the Council, since—as already recalled—it requested the latter *to give a ruling on the substance of the question.*

There is yet another objection which we must set aside. If, it might be argued, an endeavour is made to deprive the finding of the Mixed Arbitral Tribunal of the character of a *res judicata*, its nullity must be pronounced by an authority competent to do so; it might also be added that only a juridical body such as the Permanent Court of International Justice has that competence.

An argument of that nature has no juridical foundation. In domestic law, parties to an action can demand that the decision of a juridical authority should be regarded as void on the ground that the judges have exceeded their powers, without the intervention of an authority competent to pronounce the nullity of the decision for that reason. In international law, however, in the absence of clauses of an agreement providing otherwise, the procedure *at present* followed is different. A judgment pronounced by an arbitral tribunal, voidable by reason of an exceeding of powers, is non-existent and is binding on neither of the parties at issue. Thus Article 27 of the Regulations for international arbitral procedure adopted by the Institute of International Law at its session in 1875 (General schedule of the labours of the Institute (1873-1892), Paris, 1893, pages 124-131), declares that

(1) See SALVIOLI, *La Corte permanente di giustizia internazionale* (*Rivista di diritto internazionale*, 1924 ; pp. 309 and 322).

"An arbitral award shall be void in cases of... *exceeding of powers...*" without making the nullity contingent upon a formal *ad hoc* declaration.

The Hague Conventions of 1899 (Article 55) and 1907 (Article 83) on the pacific settlement of international disputes permit the revision of a judgment only in the case of the discovery of a hitherto unknown fact likely to have a decisive influence on the issue; Article 61 of the Statutes of the Permanent Court of International Justice is drafted in the same sense. But the revision of a judgment by reason of the discovery of new evidence is of quite a different nature from that of a declaration nullifying a judgment on account of an exceeding of powers. A judgment susceptible of revision is nevertheless a judgment which *EXISTS* juridically; on the other hand, a ruling given by arbitrators who have exceeded their powers *does not exist juridically*, at least from the point of view of international law.

It is conceivable that a motion for revision might, without any great disadvantage, be submitted to the same authority that gave the judgment, whereas the duty of deciding whether an arbitral award is voidable by reason of an exceeding of powers must obviously be entrusted to a judge other than the one who pronounced the judgment in question.

This duty, however, as we have already observed, could not in any case be entrusted to the Permanent Court of International Justice without the consent of both parties, for this consent constitutes the primary and essential basis of its judicial competence (1).

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The above being stated, we can now concentrate our attention on the first of the two questions submitted; the reply thereto can now be given very briefly. In substance, it is a question of determining whether the duty entrusted to the Council by Article 239 of the Treaty of Trianon is, as claimed by the Hungarian

(1) Even when apprising the *Arbitral* Court at The Hague, constituted in virtue of the Convention of 1899, of a motion for revision in connection with the controversy between the United States of America and Venezuela, already examined by an Arbitral Commission, it was necessary to draft special terms of submission which were signed at Caracas by these Powers on February 13th, 1909. Cf. SCHELLE: *Une instance en révision devant la Cour de La Haye* (*Revue générale de droit international public*, 1911, p. 164 and ff.).

Government, a compulsory duty, or whether it is merely of an optional nature.

Both the textual and logical interpretations of the second sub-paragraph of paragraph a) of Article 239 demand that this provision should be regarded merely as optional. In fact, the French text reads as follows : *Au cas où cet accord ne pourrait intervenir, le Président du Tribunal et deux autres personnes susceptibles l'une et l'autre, en cas de besoin, de le remplacer, seront choisies par le Conseil de la Société des Nations et, jusqu'au moment où il sera constitué, par M. Gustav Ador*, s'il y consent..." If it was intended to impose an actual obligation on the Council, a different expression would have been employed viz; " devront *être choisies*". Similarly, in the Italian text, we find the words "*saranno* scelti" and not "*dovranno esser* scelti". Finally, in the English text we have the expression "*shall be chosen*" which is merely the future tense of the verb "to choose". In any case, according to Article 364 of the Treaty of Trianon, in case of a divergence between one or other of the three texts (French, English and Italian) of this instrument, the French text shall prevail, except in Parts I and XIII, where the French and English texts shall be of equal force.

The undersigned does not wish to dwell on these textual considerations, for there are others, which in his opinion have far greater weight.

During the discussion that took place in the afternoon sitting of the Council on September 17th, 1927, His Excellency M. Titulesco, speaking on behalf of Roumania, made an observation which, at first sight, may seem quite simple but which was, in reality, of the utmost importance. He stated that many States Members of the League of Nations are not bound by the Treaty of Trianon nor by any other Peace Treaty. His Excellency M. Titulesco concluded that Article 239 could not have created an *imperative duty* for States which did not sign the Treaty which includes this provision.

To this consideration which, in our opinion, is of the greatest juridical importance, we would add another, regardless of whether we expose ourselves to the criticism that we are merely expressing a commonplace: All the States signatories of the Treaty of Trianon are also signatories of the Covenant of the League of Nations, which forms the first part of that Treaty. Consequently, the provisions of the Covenant and the provisions

contained elsewhere in the same Treaty should be considered as forming an organic whole. It follows that Article 239 of the Treaty of Trianon can be interpreted and applied only in correlation to the provisions of the Covenant, particularly, those of Article 11.

The obvious conclusion is that the Council could never interpret and apply Article 239 in such a way as to counteract Article 11, when on the basis of this article it might consider that it would be prejudicial to the maintenance of peace and good understanding to replace the arbitrator withdrawn by Roumania from the Roumanian-Hungarian Mixed Arbitral Tribunal.

We do not think that there is any conflict between Article 11 of the Covenant and Article 239, paragraph 2, of the Treaty of Trianon, in view of the fact that the latter article entrusts the Council with a merely optional duty. And even if it were to be assumed that, in this respect, there was a conflict between two articles, it is Article 11, which is, so to speak, of a constitutional and fundamental character that should prevail.

QUESTION II

The foregoing remarks greatly facilitate and reduce our task as regards the reply to be given to the second question submitted to us.

We have recalled that the Council adopted three principles, which, if they were accepted by Roumania and Hungary, would constitute the *law of parties* for the interpretation and application of the Treaty of Trianon by the Roumanian-Hungarian Mixed Arbitral Tribunal.

When difficulties arise in the matter of obtaining the consent of two Powers to submit to arbitration, it is wise and advantageous first to attempt to bring about an agreement between these Powers on the legal principles which the arbitrators would be called upon to apply. There are certain well-known precedents in this connection: the most famous of all is the arbitration which took place at Geneva in 1871, under the chairmanship of Count Sclopis, on the "Alabama" affair, after the United States of America and Great Britain, the two parties in the case, had agreed to accept certain juridical principles, known as the Washington principles.

The undersigned is not here required to examine from a juridical point of view the three principles suggested by the Council in the present case, but merely to examine whether the Council should ask the Permanent Court of International Justice for an advisory opinion on these principles.

Even if the question be viewed from that aspect, the undersigned ventures to point out that, in his opinion, these principles obviously constitute the most accurate and juridical interpretation of Articles 232 and 250 of the Treaty of Trianon.

The conclusion arrived at by the undersigned is based on the same reasons which led him to express the opinion that the Czechoslovak-Hungarian Mixed Arbitral Tribunal was not competent to pronounce on the legality of the agrarian laws enacted in Czechoslovakia, when he had the honour to be consulted on a dispute between the Republic of Czechoslovakia and Hungary, which was exactly similar in nature to the controversy at present before the Council. The chief points of these reasons may be briefly summarised as follows: since the provisions relating to the competence of the Mixed Arbitral Tribunals are an exception to the general rules regarding competence, they should be interpreted in a restrictive sense and quite expressly in regard to the rules of competence mentioned in Article 250 of the Treaty of Trianon, which are in derogation to those constituting the common law of the Treaty such as they emerge from Article 232. According to Article 250, the Mixed Arbitral Tribunals are competent only in cases of retention, liquidation or war measures, but the Czechoslovak agrarian laws (like the Roumanian agrarian laws), in view of their social object and general character, in so far as they are applicable *irrespective of the nationality of the owners to be expropriated* for reasons of public welfare, are not measures of liquidation. A measure of this nature exists, in the meaning of the Treaty, only when it is a case of a war measure or a measure arising out of the war and imposed on ex-enemies *as such;* this, however, is not the case in regard to the agrarian laws under consideration. Assuming even that the expropriation of property, as organised by the laws here in question, constitutes a violation of the principles of international law, the Mixed Arbitral Tribunals would not be competent to examine it, since their jurisdiction is limited *exclusively* to a case of actual " liquidation" in the strict and definite meaning of the Treaty.

Since, by examining the question and by having it examined so meticulously by its legal experts, the Council has been able to form an opinion on the meaning and legal effect of Articles 232 and 250 of the Treaty of Trianon, it is difficult to see why it should submit the principles which it has formulated in this matter to the Court at The Hague for a further opinion.

There can be no doubt that the application to the Court for an opinion is merely an optional measure for the Council; not only would such a measure be superfluous in this case but there are definite reasons of expediency (those set forth in the consideration of Question 1) for setting it aside.

Account must, moreover, be taken of the precedents, which show that, on more than one occasion, the Council has, in dealing with important questions and in order to obtain advice as to the limits of its powers, requested a Committee of jurists to formulate the principles to be followed; these principles were, in those cases, adopted by the Council *without* consulting the Permanent Court of International Justice.

It is obvious that in the present case, there can be no question of *compulsory jurisdiction* of the Court. It is true that, according to Article 13 of the Covenant, the Members of the League agree that whenever any dispute arises between them which *they recognise* to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the matter to arbitration, and that among the disputes of a nature to be settled by juridical or arbitral proceedings this article refers to those relating to the interpretation of a Treaty. But in order that a juridical settlement under Article 13 may be possible, independently of the clauses of a general or special convention, the parties must be agreed in recognising that their dispute falls within the class of question that can be solved by a court of justice. Further, if Article 13 speaks of the interpretation of a Treaty, it does so solely by way of example, so that even if one of the parties is of the opinion that the interpretation of a given Treaty, in some respect or other, involves questions of a political character, that party can with good reason refuse to submit the matter to the Court at The Hague. (See in this connection, SCHUCKING and WEHBERG, op. cit. pages 524-526; FAUCHILLE, op. cit., Part. 3, pages 635-636. — See also Ch. ROUSSEAU, op. cit., pages 298-301).

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It only remains to add a few words to refute some of the considerations contained in an article relating to "the decision of January 10th, 1927, taken by the Roumanian-Hungarian Mixed Arbitral Tribunal" published by Professor Scelle in the "*Revue générale du droit international public*", 1927, 4th edition, pages 433 and ff.

According to M. SCELLE (see in particular pages 473-481), any assimilation of Article 250 of the Treaty of Trianon to terms of submission to arbitration, which forms the basis of the Roumanian argument, is inadmissible. Such a condition would not only lead to compulsory arbitration but would also create a veritable authority accessible not to the two Governments but to the nationals of one of these Governments for the purpose of upholding individual rights, and before which it is quite unnecessary to cite terms of submission in order to determine the question of competence. Relying on one of the grounds of the judgment forming the subject of his article, M. SCELLE declares that the Hungarian nationals, the direct beneficiaries of the provisions of Article 250 of the "*Traité-loi de Trianon*" (to use M. SCELLE's expression) cannot, as a result of an agreement which might be reached between the Roumanian and Hungarian Governments, be deprived of the protection afforded to them in the jurisdiction of the Mixed Arbitral Tribunal. *In his opinion*, such an agreement would have no juridical value without the assent of the international community itself, here represented by the Council of the League of Nations.

The undersigned has no hesitation in agreeing that the Mixed Arbitral Tribunals, considering, in particular, the duties assigned to them and the persons having access to them, must be regarded as Arbitral Tribunals of a special class. And if he were asked to describe their juridical character, he would be inclined to say that they are bodies of a complex nature.

The undersigned, however, has no need to discuss that point. It is sufficient for him to recall that, in any section of law, in order to determine the competence of an Arbitral Tribunal, it is necessary to take into consideration the will of the parties which agreed to create such a Tribunal and to submit to it certain disputes which directly or indirectly concern them. In the case under examination, the will of the contracting parties

manifested itself in the terms of Articles 239 and 256 of the Treaty of Trianon. The limits of the competence of the Roumanian-Hungarian Mixed Arbitral Tribunal can therefore be fixed only by those terms, a conclusion which was fully recognised by the Council of the League of Nations.

With reference to the Hungarian nationals, who according to the expression used by M. SCELLE, are the *direct beneficiaries* of Article 250 of the Treaty of Trianon, their rights may, in regard to Mixed Arbitral Tribunals find support in the domestic law of Hungary, in that this Treaty was published in that country in the manner required by the Constitution. But the principles of domestic law thus established must be absolutely in accordance with the will of the States signatory to the Treaty. Consequently, the rights of the Hungarian nationals can be no other than those derived from the Treaty clauses, which must be interpreted and applied, *even in respect of those nationals*, in accordance with the will expressed by the contracting Powers at the time of the signing of the Treaty. Anything of a nature to contribute to the elucidation of the real meaning and exact scope of that expression of will imposes itself even on the Hungarian nationals.

In spite of the singular nature of the opinion expressed by M. SCELLE, however, there is no need for us to discuss it here ; he claims, as we have already seen, that the Roumanian and Hungarian Governments cannot agree to modify Article 250 of the Treaty of Trianon without the consent of the Council of the League of Nations. It is not here a question of modifying but merely of interpreting and applying Article 250 of the Treaty of Trianon *correctly*, and for this purpose we have not only the consent of the Council but also the principles of interpretation which it has laid down.

In view of these considerations, we reach the following conclusions :

CONCLUSIONS

1) The Council of the League of Nations, apprised under Article 11 of the Covenant and Article 239 of the Treaty of Trianon, is not bound to appoint two deputy judges for the Roumanian-Hungarian Mixed Arbitral Tribunal if it considers that such

a step would be likely to disturb peace or at least the good understanding between nations ;

2) The Council is not bound to ask the Permanent Court of International Justice for an advisory opinion on the principles which it formulated, requesting Roumania and Hungary to accept them as a means of settling their dispute concerning the Hungarian nationals and the Roumanian agrarian laws.

Milan, November 12th, 1927.

The Roumanian-Hungarian dispute and the Council of the League of Nations[1]

BY

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SUMMARY. — I. The question of substance. — II. The decision of competence taken by the Roumanian-Hungarian Mixed Arbitral Tribunal on January 10, 1927, constitutes a usurpation of powers. — III. The duties and powers of the Council of the League of Nations. — IV. The decision of the Council of the League of Nations. — V. The attitude adopted by Roumania. — VI. The true character of the Roumanian agrarian reform.

I

The question of substance.

Can a country freely modify its system of land tenure by a domestic legal enactment and does the law introduced for that purpose apply indiscriminately to all land within its territory, irrespective of the nationality of the owners?

I have studied law for fifty years but I fail to understand how such a question can be answered in the negative. The system of land tenure has always been, and must continue to be, regulated with sovereign independence by local legislation.

(1) Article published in the « *Revue de droit international et de législation comparée* » (Brussels) Nos 4-5, 1927, and translated from the French version.

The contrary view has however been taken by several eminent jurists in connection with the Roumanian agrarian reform of 1921. In support of the theory put forward by Hungary, they have declared that, in this respect, the effect of Article 250 of the Treaty of Trianon was to limit the powers of the Roumanian legislature. This Article reads as follows: "Notwithstanding the provisions of Article 232 the property, rights and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions." Relying on this text, these jurists have alleged that the provisions of the Roumanian agrarian reform law was not applicable to property situated in Transylvania and belonging to Hungarian nationals.

Their fertile imagination has enabled them to accumulate, in support of that theory, a whole series of arguments, each worse than the last, which, in spite of the respect I have for their learning, I venture to describe as sophistical. They have all come to grief on incontestable facts. Article 250 of the Treaty of Trianon refers expressly to the measures provided by Article 232 and for that reason can apply only to the war measures taken in regard to property belonging to Hungarians, that is any measures of liquidation and requisition taken as a result of the war and which are recognised by Article 232 but which, by exception, are prohibited in Roumania in respect of property belonging to Hungarian nationals.

Article 250 of the Treaty of Trianon—and this was expressly recognised by Hungary herself at the time of the Peace negotiations in 1920—leaves the Roumanian legislature entire independence, and the latter is free to take any measures modifying the system of land tenure throughout its territory and applicable without distinction to all immovable property, irrespective of the nationality of the owners thereof. Legislative enactments of this nature are undoubtedly the prerogative of the national authorities of Roumania and in declaring itself competent to pronounce on the claims submitted by Hungarian nationals in this connection, the Roumanian-Hungarian Mixed Arbitral Tribunal committed an act which constitutes a usurpation of powers.

I have no desire to resume the discussion of the question here. As stated above, I cannot understand why it should have given rise to such controversy, for the situation seems to me definite

and indiscutable. I concur entirely and without any reservation whatsoever in the extremely clear demonstration of the problem given by MM. Millerand, Politis and Rosental, counsel for Roumania, in their pleadings before the Mixed Arbitral Tribunal. I will confine myself to adding two observations.

M. Millerand proved in an admirable manner that the measures taken in virtue of the Roumanian agrarian law could from no point of view be regarded as measures of liquidation or sequestration arising out of the war. He brought out very forcibly the character of the war liquidations which, under Article 250, the Roumanian Government was precluded from effecting in regard to immovable property belonging to Hungarians. He further stated with every justification that the agrarian measures were not measures of liquidation but measures of expropriation, which applied indisputably and indiscriminately to all landed property irrespective of the nationality of the owners; expropriation, in fact, which was not prohibited by the Peace Treaty.

M. Millerand was right. For the sake of precision, however, it may be added that agrarian reform does not, strictly speaking, constitute expropriation; in reality, it is something different. Taken in its true sense, expropriation means an individual decision whereby the State, for reasons of public welfare, takes possession of certain immovable property after paying the owner equitable compensation. Agrarian reform, it is true, involves dispossession but it is the consequence of a general enactment. Its direct object is not the dispossession of any given owner; it is a general redistribution of land and a reorganisation of the system of land tenure as a whole. It does not even imply *per se* that compensation will be paid to the owners whose position undergoes a change. Still less does it imply that the compensation which may be granted to the owner must be paid beforehand and represent exactly the value of the property of which he is deprived. No doubt it is only fair that a State effecting agrarian reform should compensate injured parties, but it is not obliged to do so by law; it is still less bound by law to pay compensation beforehand and equal to the value of the property affected.

Strictly speaking, Roumania has not committed an act of expropriation. She has reorganised the system of land tenure and distribution of land. She has placed the ownership of landed property on a new basis. She wished to generalise it and thereby put in on a sounder footing in order to avoid a revolution

among the peasants and to maintain peace and order by applying methods of justice. Although she was under no imperative legal obligation to do so, she granted compensation to the dispossessed owners. It cannot be claimed against her that owing to a fortuitous circumstance—the fall of the exchange—this compensation did not exactly represent the damage finally suffered by the owner. Still less can it serve as an argument to the by the owner. Still less can it serve as an argument to the effect that in so far as the Hungarian nationals are concerned, this agrarian reform amounted to war liquidation as provided by Articles 232 and 250 of the Treaty of Trianon.

My second observation relates to common international law regarding which the Hungarian lawyers have made much ado.

Professor Scelle wrote as follows on this point: "It is agreed by both sides that as Article 250 is derogatory to Article 232 which in turn is derogatory to the principles of common law since it provides for the possibility of liquidation, whereas common law proclaims the respect of property and acquired rights of foreigners, Hungarian owners must, vis-à-vis the State of Roumania, be subject to the principles of common law regarding the status of foreigners. Now, the fundamental principle of common law is the respect of private ownership, and, in case of annexation, the respect of acquired rights in the territory annexed. Any act assailing the rights of ownership and acquired rights is contrary to the rules of common international law" (2).

There is here an ambiguity which it is both necessary and easy to express. There is no doubt—and nobody contests the point—that every State must respect and protect property belonging to foreigners and that, in the event of annexation of territory, the private property situated on that new territory is inviolable. That Article 250 of the Treaty of Trianon recognised this principle by diminishing the effect of Article 232, I admit; that point is agreed.

There is, however, another principle of international law which is no less firmly established and which is not in contradiction with the one cited above: the system of land tenure in every country is governed by territorial law, or, in other words, local legislature is alone competent to regulate, without the interven-

(2) SCELLE, *The decision of January 10, 1927, taken by the Roumanian-Hungarian M. A. T.* « *Revue générale de droit international* », 1927. N° 4 (Special issue).

tion of any other authority, the system of land tenure, to modify it as it deems fit and as required by the social conditions of the country; any enactments to this end apply indiscriminately to all owners irrespective of nationality, whether the reform be beneficial or detrimental to them.

In asserting the inviolability of property belonging to foreigners, precedents are cited and reference is made to a number of qualified writers who have asserted it in the past. These precedents and statements exist; I take note of them and approve them unreservedly. But at the same time, the oldest precedents and the authority of our oldest and most celebrated writers, from the time of our oldest law-givers, are in favour of the territorial statute, that is the principle whereby the system of land tenure of a country is always regulated and can be regulated only by territorial law. The two principles, as I have already stated, are not contradictory. A State must respect the right of foreigners: I agree. But it is always free to reorganise its system of land tenure and it will not violate the right of foreigners by subjecting their land to the same régime as that imposed on the land owned by its nationals. To deprive a State of this right would be to deny it its legislative independence; it would prevent it from ensuring, on its own territory, the conditions of social peace.

I will refrain from quoting from what might be a never-ending list of writers. I will confine myself to reproducing the statements of two eminent contemporary lawyers.

Professor Weiss, Member of the Permanent Court of International Justice and author of a treatise that has become a classic on the subject of private international law, writes as follows: "In short, the right of ownership considered alone, independently of the person exercising that right and of his own particular interest, is always governed in its nature and extent by the law of the country in which his property is situated since it affects the vital interests of the State as well as its economic system and public law" (3).

M. Alvarez, the eminent Chilian jurisconsult and Vice-President of the Institute of International Law, after quoting a passage from an article by M. de Lapradelle published in *'Le Temps'* of September 5th, 1927, in which it is stated that "there is an indis-

(3) Weiss. *Manuel de droit international privé*, 8th edition, 1920, page 528.

putable principle in international law... to the effect that the treatment of a foreigner is not judged by that applied to a national", writes as follows : "We do not agree with that opinion... If foreigners were permitted to hold more rights than the nationals of the country which has given them hospitality, this preferential status would constitute an offence against the nationals... If the country of which the foreigner is a national could prefer a complaint whenever he has suffered damage, the States would no longer have sovereign power in their own territory; in last resort, their actions would almost invariably be subject to a foreign authority which would judge of their legality. No State is prepared to accept consequences of such a nature" (4).

M. Alvarez is absolutely right. How could Roumania and Czechoslovakia have agreed to remain for ever bound by such an obligation? How could they have assumed the permanent engagement not to introduce agrarian reform laws which were not to be applied to the whole of the domains situated within their territory? How could they have undertaken to assure a privilege to Hungarian owners for all time to the detriment of public safety and peace? Such a renunciation by these States can never have entered the mind of the parties signatory to the Treaty; this is fully proved by the fact that, at the time of the negotiations, Hungary herself did not think of it and merely asked that equal treatment be assured to all owners of Hungarian and Roumanian nationality in the territories transferred to Roumania.

In the work published by the Hungarian Government under the title: *The Hungarian Peace Negotiations*, and with the subtitle: Report on the labours of the Hungarian Peace Delegation at Neuilly from January to March 1920, we find in Vol. II, page 460 a note worded as follows: "In order to attain the object mentioned in the first paragraph of Article 250, we ask for a reassuring statement to the effect that no property belonging to nationals on the territory of the former Austro-Hungarian Monarchy shall be sequestrated, liquidated or expropriated by virtue of a legal provision or by means of a special measure which does not apply, in the same conditions, to the subjects of the liquidating State or of the State putting such a measure into force."

(4) ALVAREZ, *La réforme agraire : Le litige hungaro-roumain devant le Conseil de la S. D. N.*, « *L'Europe Nouvelle* », October 29, 1927, page 450.

Now, the provisions of the Roumanian agrarian law apply in exactly the same conditions and with the same consequences to all holders of land situated in Transylvania, whether they be of Hungarian or Roumanian nationality.

In consequence, Hungary has formally recognised in advance that such measures were not of the same nature as those provided for in Article 250 of the Treaty, that it could not be claimed that they did not apply to Hungarian nationals or that they came within the jurisdiction of the Mixed Arbitral Tribunal.

II

The decision of competence, taken by the Roumanian-Hungarian Mixed Arbitral Tribunal on January 10th, 1927, constitutes a usurpation of powers.

There is here no need to go into the question why Hungary changed her attitude; why, after having recognised in 1920 that any agrarian reform which was not of a discriminatory nature did not fall to be dealt with under Article 250, that it applied in the same conditions to all Hungarian or Roumanian landowners and that it did not come within the jurisdiction of the Mixed Arbitral Tribunal, as early as 1913 she submitted claims on this subject to the Council of the League of Nations and, in 1927, supported her nationals in the request that the Mixed Arbitral Tribunal should declare itself competent to pronounce on the consequences of the agrarian measures enacted by Roumania. However this may be, the Mixed Arbitral Tribunal was apprised by certain Hungarian nationals who asked it to declare itself competent 1) to decide that, in so far as those nationals were concerned, the terms of the Roumanian agrarian law were inoperative, and 2) to order Roumania to pay compensation.

From the foregoing, it is obvious that the Mixed Arbitral Tribunal was not competent to pronounce on such claims; that, as the Hungarian owners had at first admitted, the only authorities competent in the matter were the Roumanian national tribunals. Roumania could not admit this alleged competence of the Mixed Arbitral Tribunal. She could quite legitimately refuse to plead before that body and she categorically declared

that if she nevertheless maintained her representative thereon and pleaded the case for incompetence, it was purely out of deference to that high authority. M. Millerand stated this on more than one occasion in the course of his speech. Furthermore, in the letter which he addressed to the President of the Mixed Arbitral Tribunal on February 24th, he wrote: "I hastened to add that it was only deference to international justice that had brought us before the Mixed Arbitral Tribunal in order that we might state these reasons, but that we should refuse in any case to plead in regard to the substance of the question. Remembering that we were dealing only in appearance with a legal procedure, I reserved in the most formal manner, on behalf of the Roumanian Government, its right to take what decision and attitude it might consider desirable in accordance with circumstances."

It cannot therefore now be argued against Roumania that she is precluded from rejecting the competence of the Mixed Arbitral Tribunal because she is said to have already recognised that competence. Roumania has never recognised that the Tribunal was competent. She is therefore perfectly free to maintain that this decision by which the Mixed Arbitral Tribunal declared itself competent is non-existent and cannot be cited in evidence.

Neither is there any legitimate ground for invoking against Roumania the provisions of Article 239, paragraph g) which states that: "The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive, and to render them binding upon their nationals." In fact, in order that the decisions of the Mixed Arbitral Tribunal may be binding on all parties, it is obvious that the Tribunal in taking those decisions must remain within the limits of the jurisdiction assigned to it by the Treaty. If it has pronounced on a question affecting Hungarian property, its decision is sovereign and binding on all parties, and they have no recourse whatsoever, not even to the Council of the League of Nations. But if the Mixed Arbitral Tribunal pronounces, as it did on January 10th, on any other question, and if it considers itself competent to examine a legislative enactment exclusively within the sovereign jurisdiction of Roumania and which therefore can be examined only by national authorities, it is guilty of a usurpation of powers ; its decision is valueless and non-existent. It cannot be binding on

the parties which have every right to lay this case before the League of Nations.

For this reason, Count Apponyi was entirely wrong when, speaking on behalf of Hungary before the Council of the League of Nations on September 17th, 1927, he invoked the principle of *res judicata:* "As far as I am concerned", he declared, "this question is *res judicata.* There is a decision by the Mixed Arbitral Tribunal and it is therefore final. I therefore wish to state in advance that no one will succeed in drawing me into a discussion on the question of the competence of the Mixed Arbitral Tribunal. The very interesting arguments contained in the report... have served the Council when it was pursuing the line of conciliation which it has taken up, and it will serve again when it pursues further, perhaps, that same line of conciliation. But these arguments in no way affect the question *res judicata* as to the competence of mixed arbitration in this matter. So far as I am concerned, the argument on this subject is closed."

Yes, the argument is closed, but not in the manner understood by Count Apponyi. The argument is closed because the Mixed Arbitral Tribunal has departed from the sole sphere in which it is competent. It has pronounced on a question outside its jurisdiction; its decision has therefore neither value nor weight. The question is, in consequence, no longer a jurisdictional one. There remains only a *de facto* controversy between Hungary and Roumania, which has been brought to the notice of the Council of the League of Nations; the Council then is free to carry out the mission of peace entrusted to it by the Covenant and, in particular, exercise the powers conferred upon it by Articles 12 and 15, without it being claimed that the matter has been transferred from the juridical to the political sphere. It has necessarily been removed from the juridical sphere as a result of the usurpation of powers by the Mixed Arbitral Tribunal.

There is no difficulty in bringing light to bear on this question of usurpation. There exists the indisputable principle that any tribunal is judge of its own competence, both of its competence *ratione loci* and its competence *ratione materiæ.* It is obvious, however, that it can pronounce on the latter only by judging of the nature of the act which gave rise to the question of law submitted to it. In countries, such as France, which have

adopted the system whereby disputed claims are dealt with either by administrative or by juridical authorities, an administrative tribunal which declares itself competent decides that the matter laid before it relates to an administrative act. Any decision on a question of competence *ratione materiæ* implies the recognition of a certain character concerning the act from which the dispute arose.

Similarly, whatever may be said on this point and whatever its own view may be, the Mixed Arbitral Tribunal in declaring itself competent pronounced on the question of substance. It decided implicitly that the agrarian measures enacted by Roumania and applicable without distinction to all holders of land situated within Roumanian territory were measures of liquidation in so far as concerned the Hungarian nationals, and under this pretext, it assumed a competence in a sphere which was not and which could not belong to it; it encroached on the competence of the national courts of Roumania. It was in that respect that the Tribunal was guilty of a usurpation of authority; it is for that reason that its decision is not only void but non-existent.

There is now an established and generally recognised principle to the effect that when an act is juridically non-existent. the situation should be the same as if that act had never been committed. No doubt, certain courses of law are available but they are intended to be used with a view to obtaining a declaration of nullity. The nullity of an act is not and cannot be declared when that act is juridically non-existent. The courses of law available are the same as those which existed before the act was committed and continue to exist in the same form. Since, in law, the act is non-existent, matters remain as they were.

When should an act be regarded as non-existent? Whenever one of the constitutive factors of the juridical act under consideration is lacking. For example, an act is non-existent if the fundamental factor, namely: will, is lacking. When a decision emanates from an administrative authority or from a jurisdiction, another essential factor must be present, otherwise the act is non-existent: the authority in taking the decision must remain within the province assigned to it by the objective law by which it is governed. Subject to these restrictions, competence may be shared by several officials and if, although remaining within these limits, one of them commits an act encroaching upon the

competence of another, his decision is not inexistent, it is simply void. But if the official leaves the sphere assigned to the body of which he is a member, he is guilty of a usurpation of authority. For example, he may issue a warrant of arrest; this would be not only an excess of authority but a usurpation of authority. The warrant is not only invalid, it is non-existent, or more correctly, there is absolutely nothing. The situation, as at the outset, is a mere situation of fact.

This theory, which is supported by irreproachable juridical analysis, holds good both in public international law and public domestic law. I have, moreover, protested for some time past against the tendency among many persons to erect impenetrable barriers between the various classes of law, that is, between public and private law, and between public domestic law and public international law. In public international law, this theory of usurpation of authority and non-existence finds its application in a very evident manner and the decision of the Roumanian-Hungarian Mixed Arbitral Tribunal is a striking example. In overstepping the limits of the jurisdiction which had been fixed for it by objective international law, it acted in the same manner as an administrative authority passing a resolution of a juridical nature. In both cases, there is usurpation of authority and the taking of a non-existent decision.

That the Tribunal failed to confine itself to its own sphere is abundantly proved. It must be remembered that it is one of the principles of international law that disputes are not settled by tribunals; consequently, an international tribunal can intervene only within the limits strictly assigned to it by conventional texts.

This rule, regarding competence, which is true of all international tribunals, is still more true—stricter, if possible—in regard to the Roumanian-Hungarian Mixed Arbitral Tribunal concerning which, M. Politis in his brilliant pleading clearly showed that its competence is exceptional in three different ways: it is exceptional from a general point of view, as in the case of any mixed tribunal; it is exceptional from a specific standpoint since, as it deals with claims relating to the liquidation of enemy property, it departs from the common law of peace treaties; it is exceptional for a still more specific reason because it exists only in regard to a certain category of Allied countries : the Successor States of Austria-Hungary and in regard to only one ex-enemy country: Hungary.

The object of this thrice exceptional competence, as will be seen on referring to Articles 232 and 250 of the Treaty of Trianon, is the sequestration or forced administration of Hungarian property as a result of the war. This is more than fully demonstrated at the beginning of this article. The agrarian measures taken by Roumania without discrimination are neither measures of liquidation nor sequestration. Consequently, by declaring itself competent to pronounce judgment on the claims submitted in this connection by Hungarian nationals, the Mixed Arbitral Tribunal incontestably overstepped the bounds of the very limited jurisdiction assigned to it and rigourously defined by the Treaty of Trianon; its decision therefore, is of no value.

This usurpation of authority by the Roumanian-Hungarian Mixed Arbitral Tribunal is obvious to any unbiassed observer if viewed from a very simple standpoint: The sole *raison d'être* of this tribunal, as of all mixed tribunals instituted by the several peace treaties, was the war. If there had been no war, the question of the creation of such bodies would not have arisen. If there had been no war, there would have been no war measures, the consequences of which have had to be examined; there would have been no mixed tribunals. They came into existence merely as a result of the war and because it was necessary to settle certain measures taken during the period of hostilities. Consequently, if it is a question of problems which would have arisen in exactly the same manner in times of peace; if it is a question of examining measures which, since they have no relation to the war and might have been taken by any State on its own territory—even after a prolonged period of peace—there can be no question of a mixed arbitral tribunal's examining these problems for the purpose of forming a judgment on these measures. So far as they are concerned, this Tribunal does not exist and if it should, by exception, take a decision on these matters, that decision is totally inexistent.

I ask this question: Could Roumania have carried out her agrarian reform if international peace had not been disturbed? Could she have carried it out in the terms of the law enacted? Most decidedly, she could have done so. Therefore, the measures taken are in no way whatsoever related to the hostilities. Consequently, the two persons who declared themselves competent to form a judgment of the consequences did not constitute

a mixed arbitral tribunal. The decision was taken by a group of persons that did not form a tribunal: two men without any authority and with no mandate, who declared themselves competent; therefore, the whole situation should now be the same as if nothing had been done.

This irreproachable conclusion in law has already been reached by jurisconsults of the highest authority.

M. Titulesco, representing Roumania, when submitting his observations to the Council of the League of Nations on September 17th, 1927, quoted a passage from an opinion by MM. Basdevant, Jèze and Politis to the following effect: "When an international tribunal has heard a case which is not within its competence, it has not pronounced judgment in the place of another tribunal—it has usurped the function of judge. The matter is not merely one of incompetence but of usurpation of powers. The international tribunal which exceeds its competence usurps power belonging to no other tribunal; it violates the fundamental principle of public international law, according to which disputes cannot be settled by tribunals. Its decision is non-existent. The act will not produce any of the legal effects desired by the person concerned. Any interested party can plead this non-existence by any means at any time. The irregularity can never be covered in any way."

In the above-mentioned article published in *L'Europe Nouvelle*, M. Alvarez, Vice-President of the Institute of International Law, puts forward the same argument with his characteristic authority, as follows : "The Mixed Arbitral Tribunal, set up under the Treaty of Trianon, was constituted exclusively to examine cases of war liquidation expressly referred to in the said Treaty and bearing no relation to agrarian reform, social or general measures, conceived long before the advent of the Treaty. Its competence extends no further. Consequently, the declaration by the Mixed Arbitral Tribunal to the effect that it is competent to hear and determine Hungarian claims is entirely valueless. It should be regarded as inexistent !" (5)

The solution in law leaves no room for doubt. It remains now to consider the logical consequences; these are of the utmost importance.

(5) *L'Europe Nouvelle*, October 29th, 1927, page 1453.

III

The powers of the Council of the League of Nations.

Since the Roumanian-Hungarian Mixed Arbitral Tribunal, by declaring itself competent to pronounce judgment on the claims submitted by Hungarian nationals in regard to the Roumanian law, has usurped the powers of another authority, we have left the jurisdictional sphere and entered the political sphere, and we are confronted with a disagreement of fact between two Members of the League of Nations. The Council was apprised and, in law, it is free to exercise in this connection, all the powers conferred upon it by the Covenant.

In his declaration before the Council on September 17th, 1927, Count Apponyi, speaking on behalf of Hungary, laid particular stress on transferring the question from the jurisdictional field and entrusting it to the Council, which, he declared, was exclusively a political body. He added: "This is what is particularly troubling me. I see here a tendency to ask the Council to assume the rôle of an arbitral tribunal, setting itself up above the Court constituted by the Treaty itself. I see a tendency for a confusion to arise between political power and the judicial work of a court, and this seems to me most dangerous." Count Apponyi also very forcibly pleaded *res judicata.*

This eminent diplomat would have been right if the Roumanian-Hungarian Mixed Arbitral Tribunal had remained within the limits of the jurisdiction assigned to by its *raison d'être.* But as it has been established that it was guilty of a usurpation of powers, it is impossible to rely on the alleged authority of a jurisdictional decision which does not exist. The whole question was removed from the jurisdictional field, not on account of the attitude adopted by Roumania but as a result of the course followed by the Mixed Arbitral Tribunal, and by Hungary who supported the claims submitted by her nationals. There is no question of appealing against the decision of the Mixed Arbitral Tribunal before the Council of the League of Nations. The latter is not, and does not claim to be, a High Court of International Justice. It is merely an organisation created with the intention of facilitating the amicable settlement of disputes arising between States. It is for it and for it alone to settle the dispute between

Roumania and Hungary. Contrary to the argument advanced by the Hungarian representative, its duties cannot be limited to the appointment, in accordance with Article 239 of the Treaty of Trianon, of two deputy members in place of the Roumanian delegate who, after the decision of January 10th, 1927, declared that he would refrain from taking his seat on the Mixed Arbitral Tribunal in connection with agrarian matters. If the Council adhered to that view, it would recognise the usurpation of powers committed by the Mixed Arbitral Tribunal and would fail in the high mission of international pacification entrusted to it by the Covenant of the League of Nations.

For this reason also, Roumania cannot and should not accept the terms of submission proposed by Count Apponyi, whereby it was suggested that Roumania and Hungary should submit the following question to the Permanent Court of International Justice : "By declaring itself competent to deal with the so-called agrarian cases, has the Roumanian-Hungarian Mixed Arbitral Tribunal exceeded its competence, thereby enabling Roumania legitimately to refuse to recognise the decisions taken by that Tribunal ?..."

If she accepted such a proposal, Roumania would surrender her independence ; she would be allowing an international jurisdiction to judge of the scope and effect of the legislative measures which, with sovereign independence, she takes on her own territory. The jurisdictional questions which may arise in regard to the agrarian law can exist only in the relations between Roumania and owners who, as Hungarian nationals or Roumanian subjects, are affected by the reform ; such questions fall exclusively within the competence of the national jurisdictions. The Hungarian owners fully understood this since, at first, they did not consider laying their case before any other body. To accept the terms of submission would be to recognise that the question is a jurisdictional one in the relations between the two States. This, however, is not so ; it is a question quite outside the competence of an international authority. The right to pronounce on the consequences of an agrarian law in a given country can be held only by the authorities of that country. To accept the terms of submission would mean that Roumania herself refuses to acknowledge her legislative power ; it would be depriving her of the intangible right to organise her system of land tenure as she thinks fit and appropriate.

The situation is that an international jurisdiction has overstepped the limits of its own sphere of competence ; it has assailed the legislative independence of a State within its own territory. This State very justly protests. It cannot agree to refer to arbitration because it would thereby recognise that, in certain cases, its legislative independence is not assailable ; this it cannot do. If there is disagreement on this matter, it is for the Council of the League of Nations and for that body alone to settle the controversy.

Contrary to the argument advanced by Count Apponyi, therefore, it cannot be claimed that if the Council of the League of Nations intervened, it would be exceeding its powers and acting beyond its assigned duties. It is incorrect to state that by so intervening, it would be passing judgment on the decision of an authority or assuming the powers of a Court of Appeal in relation to the Mixed Arbitral Tribunal. No award has been given against which an appeal can be lodged, since the alleged decision whereby the Mixed Arbitral Tribunal declared itself competent constitutes a usurpation of powers and is therefore non-existent. There is simply a dispute betwen two States Members of the League of Nations. The dispute has been referred to the Council and it is for that body and for that body alone to take all the appropriate steps with a view to an amicable settlement.

There is no doubt that this right is held by the Council ; this is shown by the spirit which inspired the authors of the Covenant as well as by the formal provisions therein contained. The guiding principle observed by the men who had the honour of founding the League of Nations was primarily to ensure the peace of the world. They provided for the constitution of two organisations : the Assembly and the Council, without making any definite distinction between the duties allotted to them. In point of fact, the clauses of the Covenant defining their powers are identical : "The Assembly (the Council) may deal with any matter within the sphere of action of the League or affecting the peace of the world" (Article 3, paragraph 3, and Article 4, paragraph 4). The Assembly meets at stated intervals as occasion may require but the Covenant does not oblige it to meet. The Council also meets as occasion may require, but under the terms of the Covenant it is bound to meet once a year (Article 4, paragraph 3). This clearly proves that the Council is essentially

the active body of the League of Nations, and that it is principally upon the Council that devolves the duty of taking all the measures necessary for an amicable settlement of any dispute or conflict.

This duty, which we assign to the Council by reason of the object for which it was created, devolves upon it even when, strictly speaking, there is no danger of war. It will be sufficient to recall a few provisions of the Covenant. For example, paragraph 2 of Article 11 says : "It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends." Further, paragraph 1 of Article 12 provides that : "The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council." Finally, and above all, paragraph 1 of Article 15 declares : "If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council."

The meaning and scope which we assign to these clauses were confirmed by the Council when, on March 15th, 1927, it approved the report on "suitable methods or rules for expediting the preparation of the decisions to be taken by the Council to give effect to the obligations of the Covenant." It is therein stated, in particular, that : "If there is no threat of war, but certain circumstances threaten to disturb the good understanding between nations on which peace depends, any Member of the League may bring these circumstances to the attention of the Assembly or of the Council in order that the Assembly or the Council may consider the action to be taken to restore this good international understanding (6)."

Hungary herself recognised, in 1923, that such were the powers of the Council. In the request submitted to the League by the Hungarian optants in 1923, M. Daruvary, the Hungarian Minister for Foreign Affairs, concluded by asking the Council : "1) to give a ruling on the substance of the question, namely : by

(6) *Official Journal of League of Nations*, July 1927, p. 832.

declaring that the legislative and administrative enactments of the Kingdom of Roumania, to which reference has been made, are contrary to the Treaties ; by ordering that the immovable property... should be restored and that full compensation for damage should be given to the injured parties."

The Hungarian Government was not then asking the Council to make recommendations ; it was asking for an actual decision. It is therefore wrong to claim now that the duty of the Council should be confined to the automatic appointment of two judges to complete the Roumanian-Hungarian Mixed Arbitral Tribunal. The right and duty of the Council is to deal with the matter in its entirety and to take any measures it may deem suitable for the settlement of the dispute in accordance with the highest principles of law. If it did not do so, it would be failing in its mission. It has, moreover, quite understood this.

IV

The decision of the Council of the League of Nations.

The Roumanian-Hungarian Mixed Arbitral Tribunal having declared, on January 10th, 1927, that it was competent to pronounce on the claims forwarded by Hungarian optants regarding the Roumanian agrarian law, and having called upon Roumania to deliver her reply on the substance of the question within a period of two months, the latter, on February 24th, 1927, informed the Tribunal that she would refrain from submitting her reply and that, consequently, her arbitrator would no longer sit in connection with any of the matters relating to agrarian reform. At the same time, she submitted to the Council, in virtue of Article 11, paragraph 2, of the Covenant, a request to allow her to acquaint the Council with the reasons on which she based her attitude. The Council was, at the same time, requested by Hungary to appoint two arbitrators to complete the Mixed Arbitral Tribunal, in accordance with Article 239 of the Treaty of Trianon.

On March 7th, 1927, the Council heard the representatives of the two States. Apprised of the question by Roumania and Hungary, and particularly by Roumania in virtue of Article 11, paragraph 2 of the Covenant, the Council could not, as requested

by the Hungarian representative, confine itself to the appointment of deputy members for the Mixed Arbitral Tribunal. It would thereby have disregarded its duties and failed in the important mission entrusted to it by the Covenant. In the preceding paragraph, I have shown how Articles 11, 12 and 15 entrusted to the Council, when notified by one of the parties, the duty of assuring by every means in its power the amicable settlement of any dispute arising between Members of the League of Nations.

Therefore, the Council very justly considered itself notified of the matter as a whole, and competent to take any measures that would make it possible to settle the difficulty and put an end to the dispute. It requested the eminent British representative, Sir Austen Chamberlain, to report on this question at its next session. The British Minister having expressed the desire that two of his colleagues should be appointed to act with him for the purpose of examining the question, the representative of Japan and the representative of Chili were appointed. This Committee of Three met in London and at Geneva, heard the representatives of the States concerned and consulted eminent jurists on the matter. In June 1927, at the request of Sir Austen Chamberlain, the Council adjourned the discussion of the question to its next session; on September 17th, 1927, the British representative, on behalf of the Committee of Three, read his remarkable report before the Council.

In this report, Sir Austen Chamberlain lays particular stress on the duties of the Council, which should not confine itself simply to the election of two deputy members to complete the Mixed Arbitral Tribunal. Its duty was more extensive — its duty of a higher conception. It must examine the problem as a whole and take all appropriate measures to bring about a settlement. "Looking at the problem as a whole," says the eminent rapporteur, "the Committee desired to find a solution which would allay discontent. It could not forget that the matter had originally been submitted to the Council not under Article 239 of the Treaty of Trianon but under Article 11 of the Covenant, and that its intervention had been asked for, on that occasion, first of all by Roumania and then by Hungary. In these circumstaces, it could not evade the duty imposed upon it by the Covenant and confine itself simply to the election of the two deputy members for the Mixed Arbitral Tribunal....If it did so,

it would have failed to discharge its political duties as a mediator and conciliator."

The report then went on to state that the Committee had submitted certain formulas to the parties with a view to conciliation but no agreement had been reached ; the Committee was therefore obliged to seek a solution by other methods. A minute examination of the question of the Mixed Arbitral Tribunal's jurisdiction seemed to it to be of primary importance and after examining the question and having it examined by eminent juridical authorities, it arrived at conclusions which can be formulated in the three following principles :

1) The provisions of the peace settlement effected after the war of 1914-18 do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform ; 2) There must be no inequality between Roumanians and Hungarians, either in the terms of the Agrarian Law or in the way in which it is enforced ; 3) The words "retention" and "liquidation" mentioned in Article 250, which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territories and in so far as such owner is a Hungarian national.

Finally the rapporteur suggested to the Council that if these principles were rejected by Hungary there would be no necessity for it to elect deputy members for the Mixed Arbitral Tribunal as she had requested ; it was further suggested that in case these principles were rejected by Roumania, the Council would be justified in taking appropriate measures to ensure the satisfactory working of the Mixed Arbitral Tribunal ; and finally that, if both parties refused to accept the recommendations set forth in these three proposals, the Council would have discharged the duty laid upon it by Article 11 of the Covenant.

Count Apponyi, the Hungarian representative, energetically objected to the conclusions of the report. In particular, he argued that there was *res judicata* and that it would be most dangerous to remove the cognizance of the dispute from an international authority to transfer it to the cognizance of an exclusively political body such as the Council. He suggested that terms of submission should be prepared whereby the Permanent Court of International Justice would be asked to pronounce on the question whether the Mixed Arbitral Tribunal had

exceeded its powers in declaring itself competent on January 10th. He further suggested that the Permanent Court should be asked to give an advisory opinion on "the question whether the three points enumerated by the Committee of Three in the draft Council resolution have, in whole or in part, and if so, in which part, been rendered obligatory on Roumania and Hungary by the acceptance of the Treaty of Trianon."

Replying to Count Apponyi, M. Titulesco, representing Roumania, showed that the Treaty of Trianon could not limit Roumania's legislative independence for all time, that it could envisage only war liquidations and that the Mixed Arbitral Tribunal, in declaring its competence, had been guilty of a usurpation of powers. He called particular attention to the right held by the Council to deal with the matter in its entirety as recommended to it by the Committee of Three and to the fact that it was the duty of the Council to take all the appropriate measures with a view to a settlement of the controversy and not only to appoint deputy arbitrators. M. Titulesco recalled that in 1923, Hungary had herself recognised these wide powers of the Council. He stated that Roumania could not accept the terms of submission on the question of competence because in so doing she would be admitting that the Tribunal had not been guilty of a usurpation of powers and, further, because Hungary and Roumania were in a different position since in one case it was merely a question of financial responsibility towards a member of her nationals while in the other case social order throughout her territory and public peace were at stake. Finally, M. Titulesco added that there was no necessity for asking the Permanent Court for an advisory opinion, since the Council had been completely enlightened in the matter by the study which the Committee of Three had made of the question, by the legal advice it had obtained and by the lucid report submitted by Sir Austen Chamberlain.

Of the observations which followed these explanations I will merely refer to the declaration made by M. Paul Boncour, which merits special mention : "I listened," he said "with the closest attention to the formidable and often moving arguments presented this morning by Count Apponyi in the name of Hungary. Nevertheless, they have not changed my conviction that the report of the Committee, founded on the report of the jurists whose advice had been asked, furnishes the fairest solution of

the dispute and the most desirable politically. We are here in virtue of an essential article of the Covenant, Article 11. It is in the name of that Article and on that basis that we have to discuss the question. It was, and in my opinion it must remain, conceived in the widest terms, giving the Council the widest powers. Nothing can and nothing should limit those powers, since it is the article which should allow the Council to prevent, in time, any possibility of conflict. We are also here in virtue of Article 12, since the Members of the League between whom a dispute has arisen have the choice of bringing it either before the Court at The Hague or before the Council..... The Council is obliged to settle the dispute which is submitted to it. It is settling it according to the principles of law.....".

M. Titulesco, in taking up the discussion again, declared on behalf of Roumania, that he accepted the solution recommended by the Committee of Three and demanded a vote on the whole report submitted by Sir Austen Chamberlain.

Finally, Sir Austen Chamberlain proposed that the Council should approve the report of the Committee up to and including the following recommendation : "The Committee of the Council therefore ventures to suggest that the Council should make the following recommendation : To request the two parties to conform to the three principles enumerated above ; to request Roumania to reinstate her judge on the Mixed Arbitral Tribunal." This proposal was adopted unanimously on September 19th, 1927, and the two Governments concerned were asked to forward their observations for the December session of the Council, "so that the Council may examine what further action, if any, may then be required. "

V

The attitude adopted by Roumania.

From the report submitted in the name of the Committee of Three and from the decision taken, it will be seen that the Council fully recognised the legitimacy of the Roumanian thesis. As I have explained at the beginning of this article, Roumania puts forward no other argument ; she maintains that the object of the Treaty of Trianon could not have been, and its consequence

cannot be, the permanent restriction of her legislative independence ; that Article 250 only prescribes that Hungarian property shall not be subject to the measures of liquidation arising out of the war ; that the Mixed Arbitral Tribunal is competent to pronounce only on questions connected with such measures ; that it has no jurisdiction to form a judgment of the agraian measures taken by the Roumanian legislation ; that the latter is free to introduce, in virtue of its sovereign independence, any agrarian reforms which apply equally and without discrimination whatsoever to all landowners, irrespective of their nationality, in the same way that all the peasants profit by the said reforms, irrespective also of their nationality. What are the findngs of the Council ? 1) The provisions of the peace settlement do not exclude the application to Hungarian nationals of a general scheme of agrarian reform ; 2) There must be no inequality between Roumanians and Hungarians ; 3) The words "retention" and "liquidation" apply solely to the measures taken against the property of a Hungarian in so far as such owner is a Hungarian national. Does not that constitute, point by point, the essential part of the Roumanian thesis ?

Furthermore, the Council confirms the high mission entrusted to it by the Covenant of the League of Nations, and, in consequence, that it cannot confine itself to the automatic election of two deputy arbitrators. It also implicitly recognises the usurpation of powers by the Roumanian-Hungarian Mixed Arbitral Tribunal. In these conditions, there can be no question of Roumania's accepting the terms of submission proposed by Count Apponyi whereby the question of the competence of the Mixed Arbitral Tribunal should be referred to the Permanent Court at The Hague.

Roumania protested very strongly against this competence. It pleaded before the Tribunal only out of deference to that body. She showed that it was guilty of a usurpation of powers. Moreover, a State cannot agree to terms of submission unless the situation regarding that State and the country with which it has disagreed is the same. All terms of submission necessarily imply that the question which it is agreed shall be referred to arbitration has the same characteristics and is of equal importance for both parties. This is not so in the case of the Roumanian-Hungarian controversy. In so far as Hungary is concerned, it is finally and nothing but a question of compensation

claimed, with the support of their Government, by Hungarian owners of property situated in Transylvania and affected by the agrarian reform. If they fail to obtain the said compensation, there can be no consequences of a social nature or any prejudice caused to collective interests, nor will public order and social peace in Hungary be affected. For Roumania, however, the agrarian reform affects a question of vital importance. Thanks to the energy displayed in this new distribution of land she was able to avoid a revolution of the peasant classes. If the new system of land tenure were assailed, social disorders leading to the most unforeseen consequences might ensue. Public peace within Roumania is at stake and she is asked to consent that an exclusively national question should be submitted to an international authority — a question which she alone has the right and duty to settle in virtue of her sovereignty.

Neither can Roumania agree that the Permanent Court at The Hague should be asked to give an advisory opinion on the question of substance. I admit that it is quite legitimate to obtain the opinion of that high court whenever the Council of the League of Nations considers that it requires further advice, but such is not the case here. The Council has itself recognised that the Committee of Three obtained all the information and advice to enable it to propose a solution in full knowledge of the facts. The Council concurred in the findings of the Committee and, after a detailed discussion, it adopted the three principles recommended in the report. And now it is suggested that these decisions should be repealed and that the Permanent Court should be asked to give an advisory opinion. Surely, that is a proposal which attacks the dignity of the Council and which cannot be entertained by the latter.

The proposal is also in formal contradiction with the very terms of the Covenant, particularly of Article 12 which provides that : "The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council." The Covenant therefore does not provide only two procedures for the settlement of disputes arising between two Members of the League of Nations — arbitration or inquiry by the Council. These two procedures are not complementary one to the other but would seem to exclude each other, and it is for the powers concerned to choose between them. It is Hungary

herself who has brought the matter to the attention of the Council and she is singularly at fault in asking for the intervention of the Permanent Court, even for the purpose of giving a simple opinion. She has every appearance of continually suggesting new methods with the intention of indefinitely delaying the final settlement of the dispute.

Hungary is all the less entitled to ask for the intervention of the Permanent Court since at the negotiations in 1920, as I recalled above, she recognised that if there were no differential measures in the agrarian laws, they would apply equally to Hungarian and Roumanian owners and that Article 250 of the Treaty could not be cited against them. This change of attitude seems to confirm beyond doubt that she resorts to this last procedure solely because she fully realises the unanimous feeling of the Council, which, by adopting the three recommendations suggested by the Committee of Three, recognised the legitimacy of the Roumanian thesis.

Roumania placed herself under the protection of the League of Nations and she wishes to remain under that protection. On that point, her position is unassailable. She does not in the least pretend to evade the legal issue. Although the organisations of the League of Nations are essentially of a political character, they take no action or decisions outside or beyond the sphere of law. They remain subject to the general principles of law interpreted in the broadest and highest manner. M. Paul Boncour asserted this in admirable fashion when, in addressing the Council on September 17th, 1927, he said : "The Council is obliged to settle the dispute which is submitted to it. It is settling it according to the principles of law. That does not mean that it is laying down the law, as Count Apponyi seemed to imagine this morning. But it bases its action on the principles of law, as is its duty, as it has done in many other cases, as it will be asked to do in many other occasions, and as it should in my opinion preserve its right to do..... This law on which the Committee proposes that the Council should base its decision is clearly not a law which we have created..... These are principles of law to which we can refer, like any individual or any group of individuals which has to give an opinion on a definite point..... Moreover, these principles seem to me so essential and so strong that I do not believe that they can be seriously contested as regards the main question."

VI

The true character of the Roumanian agrarian reform.

In voting her agrarian reform, Roumania merely acted in accordance with the higher principles of law. She can affirm that her sole object was to ensure a little more justice for her people, to ensure order and peace, and thus to carry out the essential mission imposed by law on all Governments.

It has sometimes been suggested that the institution and realisation of the agrarian reform by the Roumanian Government was a loophole for bolshevist doctrines and that it would undoubtedly lead to the abolition of individual land tenure in the near future. It has been stated that the Roumanians could be compared with the forerunners of bolshevism and that they were preparing the ground for its extension in Central and even in Western Europe. It has been suggested that in seeking the aid and protection of the Mixed Arbitral Tribunal the Hungarian nationals, with the support of their Government, were merely safeguarding themselves against the general confiscation to which the agrarian reform led, that they were seeking to protect themselves against bolshevism and its threatening doctrines.

That is absolutely wrong and shows, moreover, an entirely false conception of the situation ! Far from preparing the ground for bolshevism, Roumania is the outpost of latin and western civilisation against Asiatic barbarism, of which bolshevism is simply the emanation and instrument. Bolshevism proceeds by violence and hatred ; it refutes all the principles of law on which the life of civilised nations have up to the present been based : the higher principle of legality and the respect of the treaties. It refutes the very principle of individual ownership. It has abolished individual ownership by a stroke of the pen in order to realise I know not what dream of levelling communism, and for the last ten years it has imposed on a nation of one hundred million souls the most tyrannical and the most outrageous of dictatorships.

That, in a few words, is the work of bolshevism. By reason of the principles which have inspired it, by reason of the object it pursues and by reason of the methods whereby it is realised, the work of the State of Roumania is entirely different. The principle of individual ownership remains the basis of its

agrarian reform. If the State has intervened, it is not with the intention of abolishing that ownership ; on the contrary, it was with the object of setting it on a broader and sounder foundation. It wishes to rally all land workers to the principle of land ownership and thus place it on an unassailable basis. Its legislation is impregnated with the spirit of justice ; it is diametrically opposed to the doctrines of bolshevism.

Following the teaching of Auguste Comte, all sociologists now recognise that the position of a landowner is, above all, of a social nature, that he fulfils a social duty much rather than he exercises an individual right and that his prerogatives are legitimate only on condition that he properly carries out the duties connected therewith, namely the cultivation of the land. It is with a view to realising this principle of sociology and social justice that Roumania instituted her social reform and limited the extent of landed estates. Further, she compensated the landowners for the area of land of which they were dispossessed. No doubt, this compensation did not represent exactly the value of the land they lost but this was due to circumstances outside the control of the legislature. The principle, however, was recognised and the essential point is that this principle was applied. If the dispossessed owners did not receive compensation in full, it was in consequence of the economic and monetary situation : the fortuitous circumstance to which I have referred and for which the Roumanian legislature cannot be held responsible.

By introducing and carrying out the agrarian reform, the Roumanians are held in greater esteem and occupy a higher place in the thoughts of all those who understand the primary principles of law and endeavour to make them prevail. As stated by M. Paul Boncour before the Council of the League of Nations, "this legislation adopted by Roumania with the full force of national sovereignty demands all the greater respect in that it imposed greater sacrifices on her citizens." Not only did she maintain, according to a traditional French expression — order and peace with justice on her own territory — the primary duty of any State, but she also barred the road to the bolchevist invasion which threatened to reach Central Europe and even the great countries of the west. In realising this reform, the Roumanian Government gave proof of the greatest circumspection. The enactments apply to all owners in the same

conditions and in the same terms, irrespective of their nationality. None of them contains a clause which creates a special situation for an owner of non-Roumanian nationality ; there are no decisions whereby peasants who have retained their Hungarian nationality would be placed in a position less favourable than the Roumanian peasants.

It is a general reform, affecting all alike, based on justice and law, and, as stated at the beginning of this article, I fail to understand how it can be claimed that this reform does not apply to all owners of land situated in Roumanian territory, that it does not apply to all owners of Hungarian nationality. Common international law is invoked. Yes ; it is precisely on the grounds of this common international law that I assert that the scope of the agrarian reform was general ; it is in virtue of this common international law that Roumania is entitled to ask the Council of the League of Nations to maintain the three principles which it has formally laid down.

Bordeaux, November 10th, 1927.

The case of the Hungarian Optants before the Council of the League of Nations

OPINION

BY

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I

I am asked to advise on two questions arising out of a dispute between Roumania and Hungary on the position of those Hungarians who were residents in that part of the former Hungarian Kingdom which was ceded to Roumania by the Treaty of Trianon as regards the application to them of the agrarian legislation of Roumania. Under this legislation a large quantity of land was expropriated for the benefit of the peasantry, and, in consequence of the great fall in the value of the Roumanian currency the amounts provided for by way of compensation have fallen so low that the Hungarian Government contends that the compulsory expropriation of the Hungarian owners who have opted for their original nationality amounts to "retention or liquidation" contrary to the provisions of Article 250 of the Treaty.

The question was raised before the Mixed Arbitral Tribunal established under Article 239 of the Treaty of Trianon, and the

Roumanian Government, although appearing before the Tribunal stated that it did so only out of a feeling of respect for it, but declared that it was unable to recognize its competence in the matter. The Tribunal having declared itself competent, the Roumanian judge dissenting, Roumania withdrew the judge she had nominated, and appealed to the Council of the League of Nations under Art. XI of the Covenant. Hungary also appealed to the same body to fill the vacancy alleged to exist by the withdrawal of the Roumanian judge, under the terms of Art. 239 of the Treaty of Trianon

The matter was before the Council of the League in September 1927, and after the Council had taken the opinion of six jurists, it adopted the recommendations of the Committee of Three to whom it had entrusted the consideration of the whole question at a meeting in March 1927. The Council instead of accepting the point of view of either of the disputants hoped that they would accept the three principles laid down in the report of the Committee of Three as presented to it by Sir Austen Chamberlain, the Rapporteur, and that Roumania would reinstate her judge on the Mixed Arbitral Tribunal. Roumania has indicated her willingness to accept the recommendations of the Council, but Hungary refuses to do so.

The Report of the Committee of Three contained a recommendation as follows : — "In the event of a refusal by Hungary, the Committee considers that the Council would not be justified in appointing two deputy members in accordance with Article 239 of the Treaty of Trianon." This portion of the Report was deferred by the Council.

At the meeting of the Council on the 19th September, Hungary proposed that the permanent Court of International Justice be asked for an advisory opinion on the three propositions contained in the Report.

I am asked by the Roumanian Government to advise on the two following questions :

1. Under Article XI of the Covenant of the League of Nations and Article 239 of the Treaty of Trianon, can the Council of the League refuse to nominate an auxiliary judge (*juge suppléant*) ?

2. Should the Council of the League refer to the Perma-

nent Court of International Justice for an Advisory Opinion the rules which it has suggested to the Roumanians and Hungarians for the settlement of their dispute ?

II

It does not appear to me to be necessary to deal in any great detail with the facts relating to this dispute which has been before the Council since 1923 ; an adequate summary is given in the Report of the Committee of Three presented to the Council on the 17th September 1927. Neither is it necessary to consider the competence of the Mixed Arbitral Tribunal to deal with cases involving the application of the Roumanian Agrarian legislation, nor whether the plea of *res judicata* urged by Hungary is valid. The questions of importance are the competence of the Council in the dispute and its powers in regard to the nomination of two deputy members of the Tribunal, and its position in regard to the request of Hungary to obtain an Advisory Opinion from the Permanent Court of International Justice.

It may be noted that the Covenant of the League is an integral part of the Treaty of Trianon ; the whole treaty has, therefore, to be considered as one instrument.

The two parties to this dispute have on several occasions recognized the competence of the Council in relation to their differences arising out of the Roumanian agrarian legislation.

1) Hungary, by a letter of the 15th March, 1923, appealed to Article XI, par. 2, of the Covenant, and asked the Council to pass on the legality of the legislative and administrative provisions of the Roumanian agrarian laws and to say that they were contrary to the provisions of Article 250 of the Treaty of Trianon, and to order the restoration of property taken from Hungarian optants, together with damages for the wrongs done. After lengthy negotiations under the chairmanship of M. Adatci, a compromise was arrived at which was subsequently repudiated by Hungary.

2) In February, 1927, Roumania submitted to the Council under the same Article of the Covenant (XI, par. 2) a request to be allowed to acquaint the Council with her reasons for withdrawing her judge from the Mixed Arbitral Tribunal for

all cases involving the application of her expropriation laws to Hungarian optants.

3) Hungary has requested the Council to act under Article 239 of the Treaty of Trianon and in consequence of the withdrawal of the Roumanian member of the Mixed Arbitral Tribunal to nominate two deputy members.

4) Hungary has made the further request to the Council to ask for an Advisory Opinion of the Permanent Court on the three proposals contained in the Report of the Committee of Three to whom the Council entrusted the detailed examination of the case.

That both parties have appealed to the Council under Article XI is a recognition of the fact that the continuance of the dispute is affecting the international relations of the two powers and threatens to disturb the peace or the good understanding on which peace between the two nations depends. It is important to notice that the appeal was not made under Articles 239 or 250 of the Treaty of Trianon, but only when the matter was before the Council did Hungary appeal to these articles. Article XI does not lay down in precise terms what the Council or Assembly, as the case may be, is to do when their attention has been drawn to disturbing factors in international relations, but under the first paragraph of this article which deals with war or the threat of war it is provided that the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. Under Articles XII, XIII, and XV, provision is made for arbitration or submission to the Council of disputes between States. Speaking of Article XI Sir Frederick Pollock says : "Quite apart from the specific procedure outlined in Articles XII-XV, the League is hereby invested in case of any apparent danger to the general peace, with a large authority which can be exercised, according to the nature of the case, by inquiry, free conference, mediation or timely warning to any Power outside the League;" and, I would add, within it. (*The League of Nations*, 2nd ed. p. 137)

The competence of the Council is thus extremely wide. It may deal with any matter within the sphere of action of the League or affecting the peace of the world (Art. 4, par. 4) and any member not represented on the Council is to be invited to

send a representative to sit as a member at any meeting during the consideration of matters specially affecting the interests of the member. This has been done, and a Hungarian delegate is a member of the Council for the purpose of the consideration of this dispute.

It may be urged that for the Council to intervene in a dispute on a question which the parties had referred to arbitration would be to imperil the whole system of arbitration.

On general principles, where there has been a clear agreement between the parties to refer a definite matter to arbitration, and where there is no question as to the competence of the Court, the Council ought not, under Article XV, to intervene. But this is not the case under consideration. Hungary first appealed to the Council in 1923 on the question of the legality of the Roumanian agrarian legislation before taking any steps to bring the matter of their validity in regard to Hungarian Optants before the Mixed Arbitral Tribunal. Such an act might well be construed to indicate that the Hungarian Government had grave doubts as to the competency of the Tribunal to deal with the question. Roumania raised no objection to the competence of the Council to deal with the matter.

Furthermore, though the argument under consideration might have some weight if the Council had intervened on the initiative of a third party, or even of one of the parties, in this case both parties have at different times appealed to the Council on the fundamental subject of the dispute, and have based their appeal on the same article of the Covenant, and not on either of the relevant articles of the Treaty of Trianon.

I think that the Council has acted within its competence in formulating the three principles which it recommends to the parties for their acceptance. The dispute turns on the competence of the Mixed Arbitral Tribunal to deal with cases involving the application of the agrarian legislation of Roumania.

Roumania contends that it is wholly incompetent to deal with such cases, and refuses to acknowledge the validity of the decision affirming its competence. The Council has not accepted the point of view of either party. In its recommendations it does not purport to act as a Court of Appeal over-ruling the decision of the Arbitral Tribunal, but it makes proposals whereby the Tribunal may work more effectively if and when Roumania reinstates her judge.

III

The Committee of Three proposed that if Hungary refused to accept the suggestions put forth, the Council should refrain from appointing the two substitute members of the Tribunal under Article 239 of the Treaty of Trianon. It is urged that the Council would not be justified in so acting ; that the action of the Council under the Article referred to is mechanical, — a mere matter of procedure, on which it has no choice. The Article makes provision for the establishment of the Tribunal and provides for the situation which may arise if the Tribunal is not set up owing to the parties failing to agree as to the members. In such case the President and two other persons are to be chosen by the Council, such persons to be nationals of a Power that remained neutral during the late war. The Article then proceeds to consider another case where a vacancy occurs after the Tribunal has come into being. When this happens, if a Government does not proceed within one month to appoint a member of the Tribunal, such member shall be appointed by the other Government from the two persons before mentioned, other than the President. The Article does not indicate in what ways the vacancy is to arise ; normally death or resignation would be the causes of a vacancy. In this case, the Roumanian Government has withdrawn its nominee so far as concerns one class of cases. Does this constitute such a vacancy as is contemplated by the Article ? I do not think that the Council is precluded from examining the whole situation, and deciding whether there is in fact such a vacancy. The Council may justly envisage the situation which might possibly arise should it decide that a vacancy existed, and should proceed to the nomination of the two deputy-members of the Mixed Arbitral Tribunal without the previous acceptance by the parties of their recommendations. In this connection an important consideration would present itself to the Council that there was the possibility that when cases involving the Roumanian agrarian legislation were decided by the Tribunal against the Roumanian Government, that Government might refuse to implement its findings. In such a case there would be a violation of Sub-section (g) of Article 239, under which the parties agree to regard the decisions of the Tribunal as final and conclusive. If this situation arose, the tension between the two States would be

still further increased ; there would be a failure to carry out an arbitral award, and the Council would then be appealed to under Article XIII, par. 4 to "propose what steps should be taken to give effect thereto." There would then arise a "dispute likely to lead to a rupture" which the parties to the Covenant agree to submit to the Council under Art. XV. Thus the whole matter would again come before the Council. The Council, therefore, had the right and the duty to appreciate the whole situation in deciding the question whether there is such a vacancy as calls for the exercise by them of their function of nominating two persons under Article 239 of the Treaty of Trianon. The action of the Council is not purely mechanical. The Council was thus justified in keeping its prime function in mind, that of maintaining peaceful relations between the members of the League. The appointment of the two deputy members of the Mixed Arbitral Tribunal would not be the end of the dispute between the parties.

IV

There remains the question of submitting the three rules which the Council has proposed for the acceptance of the parties to the Permanent Court of International Justice for an Advisory Opinion. By Art. XIV of the Covenant "the Court *may* also give an advisory opinion upon any dispute or question referred to it by the Council or the Assembly." The question of a reference to the Court is thus left wholly to the discretion of the Council or Assembly, and it would appear that the Court is also left with discretionary powers to give or withhold an opinion. The important question arises whether the Council can refer a question to the Permanent Court by a majority of its members. This has never, so far as I am aware, been definitely settled. In a case where both parties to the dispute do not agree to a reference, and the question is not merely one of procedure, but one where an Opinion would in effect decide the substance of the case, I am of opinion that the Council must be unanimous, including the parties, who, for the purpose of the pending cause, are members of the Council. In this case the Opinion of the Permanent Court would in effect be an arbitral award, and it is a principle of International Law that no State can, without its consent, be compelled to submit its dispute with another

State to arbitration. States will not submit to arbitration questions involving their independence, and independence is menaced whenever a State is prevented from doing or not doing anything which an independent State may justly do or refrain from doing (J. Westlake. *International Law, Peace* 356). Such is the view which Roumania takes of the situation. It is because it is recognized that there are cases, — even those which involve legal considerations and the construction of treaties — which may affect a State's independence that treaties have made provision for the establishment of permanent Commissions of Conciliation. The Council exercises the functions of such a permanent Commission. It has acted on legal principles and under expert legal advice, and in this dispute both parties have appealed to it, and by its findings they should be guided.

The answers I give to the two questions submitted to me are:—

1. Under Article XI of the Covenant of the League of Nations and Article 239 of the Treaty of Trianon, the Council of the League can refuse to accede to the Hungarian request for the nomination of two deputy members of the Mixed Arbitral Tribunal.

2. The Council of the League is under no obligation to refer to the Permanent Court of International Justice for an Advisory Opinion the rules which it has suggested to the Roumanian and Hungarian Governments for the settlement of their dispute.

Cambridge. — 28 Nov. 1927.

The legal situation in the Roumanian-Hungarian dispute (*)

STATEMENT

BY

M. Edouard HIS

Doctor of Law, former Professor at the Universities of Bâle and Zürich.

After December 1923, a certain number of Hungarian optants submitted protests to the Roumanian-Hungarian Mixed Arbitral Tribunal. Such protests demanded, in particular, the restitution of rural properties which had just been expropriated by Roumania in the territories transferred to her under the Peace Treaty. The defendant party made exceptional demands pleading the incompetence of the Mixed Arbitral Tribunal. Arguments in proof of this incompetence were advanced by numerous eminently qualified experts ; on this point, I refer to my first opinion, submitted to the Roumanian Government on October 26th, 1926. The Mixed Arbitral Tribunal, however, by its decision of January 10th, 1927, declared itself competent and called upon Roumania to forward her reply within a period of two months.

Roumania, in view of this exceeding of its powers by the Mixed Arbitral Tribunal under the Peace Treaty, declared, on February 24th, 1927, that she would refrain from submitting her reply regarding the substance of the question and, consequently, that her arbitrator would no longer sit on the Mixed Arbitral Tribunal in connection with any of the protests made by Hungarian optants against the agrarian reform.

(*) Translated from the French version.

With a view to reaching a practical solution of the dispute, rendered more acute by the decision of January 10th, 1927, Roumania submitted to the Council of the League of Nations, in virtue of Article 11, paragraph 2, of the Covenant, a request to be allowed to acquaint the Council with the reasons on which her attitude was based.

The Council met on March 7th, 1927, and the Roumanian representative asked the Council to appoint two substitutes to enable the Mixed Arbitral Tribunal to continue its work. A Committee of Three formed by the Council to examine this question recommended, on September 17th, 1927, that the Council should accept three principles as a basis for political agreement between the two parties. Hungary, however, refused to accept these principles and requested that the Mixed Arbitral Tribunal should be allowed to continue its work. The Roumanian representative was prepared to accept the recommendations suggested by the Committee of Three. The Council then invited the parties in dispute to reply, before its session of December 1927, to the recommendations of the Committee.

This is the stage of affairs at which we examine the question of the *competence of the Council* of the League of Nations.

At present it is no longer a question of examining the validity of the Mixed Arbitral Tribunal's decision of January 10th, 1927. I believe that the positive provisions of Article 239 of the Treaty of Trianon do not permit of the application of the well known rules of international law on arbitration to Mixed Arbitral Tribunals also. The legal value of the decisions of January 10th, therefore, is open to doubt.

The *legal* course is, however, not the only one by which international law may solve an international dispute ; there is also the *political* course.

As early as 1923, Hungary proposed a political solution to the Council. Roumania is now, with good reasons, and relying on Article 11, paragraph 2 of the Covenant, asking for the intervention of the Council of the League of Nations, the supreme organ of international politics.

We therefore submit the following questions :

1. — *Can the legal award of the Mixed Arbitral Tribunal be set aside and replaced by a political solution reached by the Council ?*

There is no doubt that the Council is a political organisation. Although the separation of powers may not be absolutely adopted by the Covenant, there is a difference between legal and political power. To say that the Council is a legal organisation would be to restrict its liberty of action (see Le Fur, *Revue de droit international*, published by A. Sottile, 1927, 4, page 269). The Council is not bound by a method of procedure such as that of the Tribunals. It is not always obliged to apply the law in force. It is obliged to observe the law, but its work corresponds to a duty which is higher and more responsible than that of laying down the law. As a political organ it has to create the new law. First and foremost it is the organ of international legislation. It endeavours to create new legal relations of international law which in most cases are not general "laws", but international conventions, treaties and agreements between States. The Council must not violate the law in force, but it must encourage the creation of a new and better law.

2. *What is the relation between the political solution and the legal solution ?*

From a legal point of view it might be said that the two courses, the jurisdiction of the Mixed Arbitral Tribunal, and the mediation or intervention of the Council of the League of Nations, are of *equal* value. But in practice one of the two courses has to be chosen. In the present case, it is a question of which of the two must be given preference.

The law of the League of Nations makes a distinction between disputes which are suitable for submission to a Court of Justice or arbitration and those not suitable for such a solution (see Covenant, Article 13, etc.). In the case of disputes which can be settled by law, the preference is given to jurisdiction or arbitration, and political disputes are solved through diplomatic or political channels. In which category must we class the Roumanian-Hungarian dispute?

The simple expropriation of the immovable property of an individual by the State is — in case of protest — nothing more than a legal dispute which should be settled by arbitral award. The Roumanian-Hungarian dispute is different. All the expropriations imposed by the Roumanian Government on owners of land, whether of Roumanian or other nationality, constitute primarily a question of internal politics. Further, the collective

protests of Hungarian optants vis-à-vis the Roumanian Government constitute a question of supreme national and international policy. These protests by Hungarian optants result more or less in the complete disorganisation of the agrarian reform in Roumania ; they tend to prevent a reform which is of vital importance for Roumania. The Hungarian optants are demanding after all a more privileged treatment than that enjoyed by Roumanian nationals; they are thus endeavouring to introduce an inequality of law which is absolutely foreign to the constitutional law of Roumania and to international law. The decisions of the Mixed Arbitral Tribunal as to its competence assail the very sovereignty of the State. It is not a question of small private interests; the power, integrity and honour of the country are affected by the present dispute. Moreover, the friendly international relations between Roumania and Hungary are jeopardised thereby.

A whole series of proceedings forming a dispute of such political importance ought not to be settled by tribunals which give no guarantee of a satisfactory solution from a political point of view. It is therefore for very sound reasons that Roumania has chosen the political course by submitting the dispute to the Council of the League of Nations. A political, rather than a legal or arbitral solution, must be found for the Roumanian-Hungarian dispute.

3. *Has the Council the right and is it its duty to deal with the dispute?*

The Council has the right to deal with this dispute, not because it has the right of supervision over the Mixed Arbitral Tribunals, but because the proceedings instituted by Hungarian optants, which may at first sight appear to be disputes calling for legal or arbitral settlement, have as a whole become a question which can be settled *only* by a political solution. The cause of this development in the nature of the dispute lies principally in the obstinacy with which the Hungarian representatives are fighting the agrarian reform in Roumania.

Further, the Council is even *obliged* to intervene in the Roumanian-Hungarian dispute if so requested with good reasons by one of the parties.

The cases in which the Council must intervene are, in principle, restricted.

Roumania relied upon Article 11, paragraph 2, of the Covenant when she submitted the question to the Council. The cases mentioned in paragraph 2 are to be treated in the same way as those under the preceding paragraph. The latter refers to war and threats of war; paragraph 2 lays stress on "any circumstance affecting international relations *which threatens* (not *or* threatening) to disturb international peace or good understanding between nations upon which peace depends." If any disagreement, misunderstanding or dispute between two States begins to threaten the peace by disturbances, appeal to the Council is admissible. Such disturbances may even affect only one of the two parties; if, for example, the feelings of a State against a neighbouring State are of a threatening or disturbing nature while the neighbouring State remains peaceful, they are nevertheless disturbances of peace which justify appeal to the Council.

4. *What measures may be taken by the Council under Article* 11, *paragraph* 2?

Paragraph 1 of Article 11 confers upon the Council the right and at the same time instructs it to "take any action that may be deemed wise and effectual to safeguard the peace of nations." Paragraph 2 makes no mention of measures to be taken. In the case of the latter paragraph therefore the idea is that the same measures are admissible as those for cases falling under paragraph 1. Such measures must be "*deemed wise* to safeguard" etc., but they are not restricted. *The Council has full and entire liberty to choose among its measures those which are best calculated to achieve its object, namely, the safeguarding of peace.* There is no justification for the authors who wished to restrict this power of the Council. The Council may even apply military sanctions against a State which is disturbing peace.

There is, however, a certain difference between the treatment of cases falling respectively under paragraphs 1 and 2. Speaking of war or threats of war, that is, of more imminent dangers, paragraph 1 confers upon the Council the right to apply the most effectual and severe measures to restrict the liberty and sovereignty of a State. As the cases under paragraph 2 are less serious, they may be settled by less severe measures without, however, any restriction as to choice of measures.

The measures to be taken under Article 11 of the Covenant may consist of restrictions imposed on the functioning of the

constitutional power of a State. The Council may prohibit the execution of arbitral awards, it may even prohibit the sessions of the tribunals.

5. *Can the Council refuse to appoint two substitutes as judges on the Mixed Arbitral Tribunal?*

Article 239 (a) paragraphe 2 and 3 of the Treaty of Trianon imposes upon the Council the obligation, in case there is a vacancy, to appoint two candidates, one of whom may be chosen by the Government demanding the appointment (Government of the other State). By this obligation, the Council has become the executory organ of the former Peace Conference. Being allied to international law and especially to the law created by the Peace Treaties, it is not independent vis-à-vis such regulations. It shares the responsibility of the work of the Mixed Arbitral Tribunals which, according to the intention of the Peace Treaty, must continue to sit.

It is however this very responsibility which might compel the Council to prevent the functioning of a Mixed Arbitral Tribunal by a measure necessary for the safeguarding of peace within the meaning of Article 11 of the Covenant. This measure might even assume the form of refusal to appoint candidates (according to Article 239 of the Treaty of Trianon).

Having the right of choice between political measures calculated effectually to safeguard peace, the Council should decide whether the dispute is of so serious a nature as to warrant the prevention of the functioning of a Mixed Arbitral Tribunal. Such an eventuality may arise if this Tribunal itself is the cause of the disturbances in one or both countries. In the Roumanian-Hungarian dispute it seems that the decisions of January 10th are especially calculated to threaten peace between the two parties. If, therefore, the Council wished to restrict the powers of this Tribunal it could do so with the least political effort by refusing to appoint the two candidates.

It might be said that this would constitute intervention by the Council in international jurisdiction. This is not true. The Council would not interfere with the substance of the questions. It would, for reasons of higher policy, merely prevent or delay formal proceeding until the situation had become less dangerous.

The Council could exercise these rights on the ground of

political necessity, but not because the political course is in any way superior to the legal course. The great difficulty in regard to the political course, which the Council is endeavouring to follow, lies in the necessity of uniting the two parties by mutual agreement. In the present case, Roumania alone has declared her willingness to accept the recommendations of the Council, while Hungary wishes to continue the legal proceedings with an arbitrator appointed by the Council.

The Council, having two duties, that of appointing two candidates (a formal duty) and that of preventing the functioning of the Mixed Arbitral Tribunal (a fundamental duty) must choose the latter, because—as M. Politis has said—of the two duties, this is the more imperative, the more urgent and the more efficacious (see N. Politis in the *Revue bleue*, November 19th, 1927, page 677). It goes without saying, however, that such a serious course must be adopted only as an *ultima ratio*, since a measure of that kind would paralyse an international jurisdiction.

6. *Can the Council prevent the execution of a valid decision of the Mixed Arbitral Tribunal?*

Even assuming the decision of the Mixed Arbitral Tribunal of January 10th, 1927, as to its competence, to be valid, it might be asked whether the Council has the right to delay or prevent the execution of such a decision. The question must be settled by the same reasoning as the preceding question (5). If the Council is of opinion that reasons of higher policy necessitate a measure of such gravity, nothing will prevent it from putting it into operation, since, under Article 11 of the Covenant, its powers are unlimited.

Bâle (Switzerland) November 30th, 1927.

The question of Hungarian Optants before the Council of the League of Nations.(*)

BY

Charles LYON-CAEN

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The undersigned, Member of the Institute of France, Dean of the Faculty of Law of the University of Paris, having been consulted on the following questions :

1) *Could the question of Hungarian optants, under its twofold aspect, political and juridical, be referred to the Council of the League of Nations?*

2) *Had the Council of the League of Nations, when appealed to by Roumania under Article* 11 *of the Covenant and by Hungary under Article* 239 *of the Treaty of Trianon, the right to refuse to replace the judge of the Roumanian-Hungarian Mixed Arbitral Tribunal withdrawn by the Roumanian Government?*

3) *In order to take a decision on the dispute under consideration, was the Council of the League of Nations obliged to refer the question to the Hague Permanent Court of International Justice for an advisory opinion?*

Expresses the following opinion :

THE FACTS OF THE CASE

None of the above three questions affects the substance of the dispute which has arisen between Roumania and Hungary. In order to understand the situation, however, it is first of all neces-

(*) Translated from the French version.

sary to give a brief summary of the facts which led up to the dispute to which these questions relate.

Some years ago, a serious dispute arose between Roumania and Hungary. Before the world war it was decided, for purposes of public welfare, to allot to the peasants the lands cultivated by them against a payment to be fixed by Roumania. In 1914, a Constituent Assembly was formed, but its labours were stopped by the war. Nevertheless, from 1917 to 1921 several laws were enacted realising this vast scheme of agrarian reform. It was applied throughout Roumania, without distinction. In the territories transferred to her under the Treaty of Trianon, this reform affected all owners of land whether of Roumanian or other nationality, including Hungarian optants. A certain number of the latter protested against the application of the Roumanian agarian law to their property, declaring that this was contrary to the provisions of Article 250 of the Treaty of Trianon, which lays down that the property, rights and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation. The Hungarian Government supported this claim ; the Roumanian Government contested it on the ground that the measure admitted by the Roumanian agarian law was one of expropriation and not of liquidation. It added that if this measure were not applied to Hungarian optants it would give rise to a question of preferential treatment, whereas, under the general principles of law all that foreigners could demand was to be treated in the same way as nationals under the laws of the country in which they were settled. This dispute was referred by Hungary to the Roumanian-Hungarian Mixed Arbitral Tribunal which, in virtue of Article 239 of the Treaty of Trianon, was composed of three members, a representative of each of the two States and a President of neutral nationality. The Roumanian Government, as defendant, alleged the incompetence of the Tribunal, declaring that agrarian reform is not a measure of liquidation or a measure of war affecting only enemy subjects for the mere fact that they are enemies. Notwithstanding the evidence in justification of the Roumanian argument, the Tribunal declared itself competent. As a result of the decision recognising the competence of the Roumanian-Hungarian Mixed Arbitral Tribunal, the Roumanian Government, not wishing to continue to be party to the

usurpation of powers, declared its intention of withdrawing its representative from the Tribunal for the settlement of questions relating to the application of the Roumanian agrarian law to Hungarian optants. The Roumanian-Hungarian Mixed Arbitral Tribunal was thus unable to take a decision as to the substance of the dispute.

After the withdrawal of the Roumanian judge, first the Roumanian Government, then the Hungarian Government, submitted to the Council of the League of Nations two protests based on the provisions of Article 11 of the Covenant and those of Article 239 of the Treaty of Trianon respectively.

The Hungarian Government pleaded that the seat of the Roumanian judge on the Roumanian-Hungarian Mixed Arbitral Tribunal was vacant and requested the Council of the League of Nations to apply the procedure established by Article 239 of the Treaty of Trianon with a view to filling this vacancy.

On its side, the Roumanian Government laid before the Council of the League of Nations a protest based on Article 11 paragraph 2 of the Covenant whereby each Member of the League has the friendly right to bring to the attention of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

Before the Council of the League of Nations the Roumanian and Hungarian Governments were in complete disagreement in regard to the respective protests submitted to that organisation.

On the one hand, the Hungarian Government maintained that under Article 11 of the Covenant the Council of the League of Nations was not competent to intervene, that it should at least request the Hague Permanent Court of International Justice to give an advisory opinion and should take the necessary steps to fill the vacancy on the Mixed Arbitral Tribunal caused by the withdrawal of the Roumanian judge.

On the other hand, the Roumanian Government maintained that the Council was indeed competent under Article 11 of the Covenant, that it was under no obligation to request an advisory opinion by the Hague Court and that it should refuse to replace the judge withdrawn by the Roumanian Government from the Mixed Arbitral Tribunal after that Tribunal had declared its competence.

These are the facts on which the three above mentioned questions are based. These questions must be successively examined and solved.

EXAMINATION OF THE QUESTIONS. SOLUTIONS

1) *Could the question of Hungarian optants, under its twofold aspect, political and juridical, be referred to the Council of the League of Nations?*

It has been maintained, in the name of the Hungarian Government, that the Council of the League of Nations could not intervene, being incompetent to examine the question on account of its juridical nature. According to the Hungarian representative, the Council can be asked to intervene only in the case of political questions; there are other organisations for juridical questions, which come within the exclusive competence of the Mixed Arbitral Tribunals and The Hague Permanent Court of International Justice. In support of this opinion, it has been recalled that it is usual in the various States, in virtue of the separation of powers, for the Tribunals alone to be competent to decide juridical questions and it has been alleged that the results would be most serious if such questions were referred to persons or organisations other than magistrates.

This argument is certainly ingenious, but it is false, and this for several reasons.

It is scarcely necessary to say that it is doubtless true that the principle of the separation of powers admitted in the States renders it difficult for organisations other than the Tribunals to know the facts of questions of a juridical nature. The League of Nations, however, is neither a super-State nor even a State, it is an institution of a very special nature with a new and special organisation. Further, even though the League of Nations were to be considered as a State existing by the side of States which are Members of the League, this would not necessarily lead to the recognition of the principle of separation of powers within the League of Nations. This is not a sort of principle of higher natural law which ought to be recognised even in the absence of any special provision to that effect.

We would search in vain for a clause to this effect in the provisions of the Treaty of Trianon on which the Covenant is based. Far from the existence of such a provision, the language of Article 11, paragraph 2 of the Covenant implies that the Council of

the League of Nations is competent to intervene whatever may be the nature of the circumstance which threatens to disturb peace. Moreover, the main purpose for which the League of Nations was created imperatively demands that the competence of the Council of that League be unlimited, that is, that its competence includes juridical as well as political questions.

Article 11, paragraph 2 of the Covenant, on which Roumania relied when appealing to the Council of the League of Nations, reads as follows :

> "It is also declared to be the friendly right of each Member "of the League to bring to the attention of the Assembly or "of the Council any circumstance whatever affecting inter- "national relations which threatens to disturb international "peace or the good understanding between nations upon "which peace depends."

The words "*any circumstance whatever*" obviously imply that whatever may be the circumstance which threatens to disturb peace and the good understanding between nations it may be brought by a Member of the League of Nations to the attention of the Council.

Further, if it were otherwise, if the intervention of the League of Nations were excluded in regard to questions of a juridical nature, the main object in view in the creation of this vast institution might often be defeated. That object is to ensure the maintenance of Peace to the greatest possible extent. When Peace is threatened, the Council must by its intervention be able to avert the risk of war. If, when questions of a juridical nature disturb the good relations between States, recourse to the Council of the League of Nations were impossible, the question would have to be referred to the Hague Court or to a Mixed Arbitral Tribunal. Having regard to the procedure to be followed before such jurisdictions, they cannot naturally pronounce an award with sufficient rapidity to avert war between States Pending the award, war might be declared and have resulted in extensive devastation and loss of human life by the time the award was given.

The Council of the League of Nations is the sole organisation which can, with the rapidity which is sometimes necessary, pronounce on the dispute which is threatening peace and take the necessary measures to settle an international quarrel.

It is not, moreover, always easy to determine whether a question on which States are divided is juridical or political. Again, by the side of questions which are exclusively either juridical or political, are others which are both juridical and political. The question of the Hungarian optants, which is causing such a serious division between Roumania and Hungary, seems to belong to the latter category.

2) *Had the Council of the League of Nations, when appealed to by Roumania under Article* 11 *of the Covenant and by Hungary under Article* 239 *of the Treaty of Trianon, the right to refuse to replace the judge of the Roumanian-Hungarian Mixed Arbitral Tribunal withdrawn by the Roumanian Government ?*

After having determined the organisation of the Roumanian-Hungarian Arbitral Tribunal, Article 239 of the Treaty of Trianon (3) envisages the case of a *vacancy*. Under this clause, if in case there is a vacancy a Government does not proceed within a period of one month to appoint a member of the Tribunal, the Council of the League of Nations shall choose two persons, nationals of Powers that have remained neutral during the war, and the other Government shall choose a substitute from these two persons.

It is doubtful, however, whether the case contemplated by Article 239, paragraph 2, of the Treaty of Trianon has arisen. As we have just stated, the latter refers to the case of a *vacancy*. Now, a *vacancy* obviously arises when a judge dies, resigns or is completely prevented for some reason or other from fulfilling his duties so that in a given instance he does not attend. Is there a vacancy, within the meaning of Article 239, paragraph 2, when a judge is merely prevented from participating in the discussions of the Mixed Arbitral Tribunal on a given question or on questions of a given category ? It is doubtful. This, however, is the case in the dispute under consideration ; the Roumanian Government has withdrawn its representative only for questions relating to the application of the Roumanian agrarian law to Hungarian optants. This is a very special and exceptional case. It is not astonishing that the authors of the Treaty of Trianon did not even dream of such an eventuality. The procedure laid down by Article 239, paragraph 2, for the

replacing of the judge is therefore not applicable to the present case.

Further, assuming, on the contrary, that this provision is applicable, it does not follow that the Council of the League of Nations is obliged to conform thereto. It cannot be too fully understood that for the accomplishment of its high and difficult mission, the power of the Council of the League of Nations must be absolute, so that, according to circumstances which may be of the most varied character, it may at its discretion adopt or refuse to adopt a certain provision, a certain decision, or take a certain measure which is calculated to establish good understanding between nations and avert war. It is possible that in certain circumstances the Council of the League of Nations may deem it preferable not to have recourse to the procedure of Article 239, paragraph 2, of the Treaty of Trianon to fill the vacancy of a judge on a Mixed Arbitral Tribunal.

In the present case, one of the Governments in dispute, the Roumanian Government, rightly alleges that the Mixed Arbitral Tribunal is incompetent, that any award which it might give on the substance of the question would be inoperative, so that after such an award the dispute would still continue with all its inherent disadvantages and dangers. In the presence of such facts, why could not the Council of the League of Nations decide that it is preferable not to adopt a measure which, it is true, would enable the Mixed Arbitral Tribunal to give an award, but which would not be calculated to put an end to a situation threatening the maintenance of peace. To fulfil its mission, the liberty of the Council of the League of Nations must be absolute ; it has full power to choose among the methods at its disposal.

3) *In order to take a decision on the dispute under consideration, was the Council of the League of Nations obliged to refer the question to the Hague Permanent Court of International Justice for an advisory opinion ?*

The principal mission of the Hague Permanent Court of International Justice is, as indicated by its very name, to examine disputes referred to it and then to give awards. It can however be called upon to fill another rôle ; in the event of difficulties of a juridical nature, this supreme jurisdiction may be asked to give its opinion, this is called an advisory opinion. Since its creation, the Court of The Hague has frequently been called upon

to pronounce such opinions. In theory, the advisory opinions of the Permanent Court of International Justice are not binding on those who have solicited them. But, in fact, the parties concerned, or, more generally, those who have appealed to the Court, always submit thereto.

It is certain that the Council of the League of Nations, if not sufficiently enlightened on a question of law, may, before giving its decision, ask the Hague Court of Justice for an advisory opinion. This opinion may be of the greatest assistance; the eminent magistrates who comprise this Court are jurists of the highest repute and their unanimous or majority opinion is worthy of the utmost confidence. But the Council of the League of Nations is not *obliged* to consult the Court of The Hague on questions of law on which it has to take a decision. *This is purely optional.* The Council, if not sufficiently enlightened, has an option as to the measure to which it may resort to obtain an opinion for its guidance; it may appeal to one or to several jurists, or to the Permanent Court of International Justice.

The Council of the League of Nations could not be obliged to ask the Court of The Hague for its opinion unless there were a formal provision imposing such an obligation. The Covenant contains no such provision.

There are many very forcible reasons in justification of the purely optional character of recourse to the Court of The Hague for an *advisory opinion.* As I have already said, such an opinion is, in theory, certainly not compulsory for the Council of the League of Nations, in the sense that it is obliged to conform thereto. But, in fact, it is of the greatest significance that when an advisory opinion is given by the Court it must be accepted in the same way as an award. Otherwise, the authority of the Court would be seriously assailed. Therefore, in reality, by asking for an advisory opinion, the Council of the League of Nations completely relinquishes responsibility; it is a material impossibility for the Council to reject the advisory opinion in favour of another opinion. Naturally, the Council does not wish to resort to a measure which would lead to the question being taken out of its hands.

This is not all. We know that when it is called upon to give an advisory opinion, the procedure followed before the Court is the same as in the case of juridical proceedings, that is, of proceedings in which the Court has to give an award. There

is therefore a preliminary exchange of notes between the parties concerned, who maintain divergent views, then follow the speeches and a discussion by the Court which, in view of the extreme conscientiousness with which the magistrates of the Court exercise their functions, covers a fairly long period. Therefore, several weeks must elapse before the Court is able to pronounce its opinion. The period is still further prolonged if the Court is not sitting when asked for an advisory opinion.

The gravity of the dispute, the marked feeling of unrest and the acts of violence already committed may oblige the Council of the League of Nations, asked to intervene in virtue of Article 11, paragraph 2, of the Covenant, to take a prompt decision and to determine without delay the measures which it may deem wise for the maintenance of peace. If the Council had previously to appeal to the Court of The Hague for an advisory opinion, it would be absolutely impossible for it to take a prompt decision.

For the foregoing considerations it is therefore reasonable that when a question of law is referred to the Council of the League of Nations in virtue of Article 11, paragraph 2, of the Covenant, recourse to the Hague Permanent Court of International Justice for an advisory opinion should be merely an optional and not an obligatory measure.

Paris, November 2nd, 1927.

The roumano-hungarian dispute as to expropriations in Transylvania

BY

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I am asked to answer certain definite questions as to the duties of the Council of the League of Nations (under the Covenant of the League of Nations annexed to the Treaty of Trianon of June 4th 1920 and certain articles in the said Treaty) in relation to the expropriation of the lands of certain proprietors in Transylvania, known as the Hungarian Optants. The issue between the Hungarian and the Roumanian Governments on which these questions arise is of highest importance, since it involves the ultimate principles on which the authority of the League of Nations depends.

SUMMARY OF THE FACTS

The relevant facts relating to this dispute are apparently as follows :

Some months before the outbreak of the War of 1914 a General Election in Roumania affirmed, on the ground of national necessity, the principle of the expropriation of large estates in order to create peasant proprietorship on a substantial scale. The outbreak of war delayed legislation, but in 1917 during the war the appropriate legislation was passed on the terms that the expropriated owners should be granted Government Stock payable in 50 years bearing interest at 5 %, the nominal value

being estimated as equal to the cash value. After the Armistice of November 11th, 1918, these same social reforms were applied to Transylvania and other territories transferred to Roumania as the result of the war. The Hungarian peasants in Transylvania benefited in the same way as the Roumanian peasants in the old Kingdom of Roumania, and the Hungarian landowners suffered with the Roumanian landowners as a result of the fall in the value of Roumanian money. The Hungarian landowners in Transylvania who had chosen under the Treaty of Trianon to remain Hungarian subjects and are known as the Hungarian Optants refused and still refuse to accept these Agrarian reforms unless they are compensated in gold. They contend that the operation of the Agrarian Law amounted in fact to war liquidation or retention of enemy property (within the meaning of Article 232 of the Treaty of Trianon) and that this is expressly forbidden by Article 250 of the said Treaty. Article 250 provides that claims under the Article shall be submitted to the *Mixed Arbitral Tribunal* provided by Article 239 of the said Treaty. Article 239 supplies machinery for the creation of this Tribunal of three judges; two of the members being appointed by the Hungarian and Roumanian Governments respectively, and the President being chosen by agreement between the same two governments. The Article provides a procedure for creating the tribunal in the event of disagreement between the Hungarian and Roumanian Governements as to the President of the Tribunal, but in fact agreement was reached and this alternative procedure never became operative.

A preliminary question was whether the Mixed Arbitral Tribunal was competent to decide the question whether the expropriation of the lands of Hungarian Optants was a measure of liquidation. This matter was argued before the Tribunal in December 1926, the Roumanian Government only appearing for the purpose of denying the competence of the Tribunal. On January 10th, 1927, the Tribunal declared, by a majority, that it was competent, and the Roumanian Government immediately withdrew in respect to all Agrarian cases the judge whom they had nominated and who has dissented from the Majority Judgment.

On this question of competence it may be said that an Arbitral Tribunal as a rule cannot determine the limits if its own competence unless the instrument which creates it (in this case the

Treaty of Trianon) makes the jurisdiction depend on the decision of the Tribunal itself to the effect that a state of affairs exists upon which the jurisdiction depends. I am not asked to advise whether the Mixed Arbitral Tribunal was entrusted by the Treaty of Trianon with powers that make it the final judge of its own jurisdiction (1) but I may say that I find it difficult to detect any such delegation of authority in the Treaty of Trianon. In any event there is no Court of Appeal from a decision of the Mixed Arbitral Tribunal.

The Roumanian Government as a result of the decision and the consequent withdrawal of their judge carried, by request dated Feb. 24th, 1927, the whole question (under Article 11, paragraph 2 of the Covenant of the League of Nations) before the Council of the League in order to explain their action. The Hungarian Government replied by demanding that the Council of the League should replace the judge withdrawn by the Roumanian Government, under the provisions of Article 239 of the Treaty of Trianon. The Council of the League considered the matter on March 7th, 1927, and appointed a Committee of Three to find the solution and to report at the Session of June 1927. This Committee sought the opinion of six eminent international lawyers drawn from six different nations and in the light of that opinion framed the report which was presented to the Council on September 17th, 1927. This report laid down the three following principles.

1. The provisions of the peace settlement effected after the war of 1914-18 do not exclude the application to Hungarian Nationals (including those who have opted for Hungarian Nationality) of a general scheme of Agrarian Reform.

2. There must be no inequality between Roumanians and Hungarians, either in the terms of the Agrarian Law or the way in which it is enforced.

3. The words "Retention and liquidation", mentioned in Article 250, which relates only to the territoires ceded by Hungary, applies to the measures taken against the property of a

(1) As to the question of jurisdiction see the English cases MAY v. MILLS (1914) 30 Tlr. 287 ; PRICE v. POPKIN (1839) 10 A. et E. 139 ; FARIELL v. *East Counties Railway Co* 1848, 2 Exch. 344 ; A. g. for Manitoba (1922), 1 A. C. 276 ; The BETSY G. SPENCER BOWER *Res Judicata* (1924) 74-5.

Hungarian in the said territories and in so far as such owner is a Hungarian National.

In view of these principles the Committee of Three suggested that the Council of the League should make the following recommendation:

a) To request the two parties to conform to the three principles enumerated above.

b) To request Roumania to reinstate her judge on the Mixed Arbitral Tribunal.

Other proposals in the case of non-acceptance of either or both the parties to the dispute were also made.

The Roumanian Government accepted the proposals of the Committee of Three and the Hungarian Government rejected these proposals. The Council, after long debate, decided unanimously to accept the Report up to and not beyond Paragraph (a). The two members of the Council who are parties to the dispute were not asked for an opinion but were asked to delay their opinion until December 1927 in the hope that they would favourably consider the decision of the Council to request the two parties to conform to the three principles enunciated above.

I am asked to advise:

1. Under the Article 11 of the Covenant and Article 239 of the Treaty of Trianon can the Council refuse to nominate an Auxiliary Judge.

2. Should the Council refer to the Permanent Court of Justice at The Hague for an Advisory Opinion on the rulings which it has suggested to the litigants.

I

OPINION

Under Article 11 of the Covenant and Article 239 of the Treaty of Trianon can the Council refuse to nominate an Auxiliary Judge?

I approach the question at first from the point of view of the textual construction of Article 239. The Mixed Arbitral Tribu-

nal has decided by a majority of 2 to 1 that it is competent to deal with the question of the expropriation under the Roumanian Agrarian Law of Hungarian Optants who are landowners in Transylvania. The Roumanian Judge on the Tribunal was, thereupon, withdrawn by his Government. The question of construction is whether the Council of the League can refuse to appoint a substitute. At this stage I do not pause to enquire whether the Tribunal had power to assert its own competence, or whether the decision is right. I am content on this matter to adopt the views of the six jurists before mentioned though I should wish to express my opinion that the retirement of the Roumanian judge from the Mixed Arbitral Tribunal in respect to all Agrarian matters was entirely justified in the circumstances of the case.

The Hungarian Government has demanded that the Council of the League shall appoint under Article 239 of the Treaty of Trianon a substitutional or auxiliary judge in order to enable the Mixed Arbitral Tribunal to function anew in the Agrarian cases. The question falls into two parts :

a) Whether the Council has power on the construction of Article 239 to nominate a substitutional judge at all.

b) If so, whether it is compelled to do so.

a) This a pure question of construction on the wording of Article 239 and the Annexe to that Article. Annexe 1 provides that "Should a member of the Tribunal... retire... the same procedure will be followed for filling the vacancy as was followed for appointing him." That procedure is indicated in clause *a* of Article 239. The wording is as follows : "Each such Tribunal shall consist of three Members. Each of the Governments concerned shall appoint one of the members. The President shall be chosen by agreement between the two Governments concerned. In case of failure to reach agreement, the President of the Tribunal and two other persons either of whom may in case of need take his place, shall be chosen by the Council of the League of Nations... these persons shall be Nationals of Powers that have remained neutral during the War."

So far it is clear, in my opinion, that this clause only refers to a dispute as to the person to be chosen as President. The President was to be chosen by agreement and if agreement was not

reached the Council was to choose three persons, Nationals of Powers neutral during the war, and nominate one of these as President, the other two being available to take the President's place in case of need. In fact in the case of Hungary and Roumania agreement as to the President of the Tribunal was reached, and the Council was not called upon to choose three persons, or any person, and there is not in existence any panel of selected persons.

The second paragraph of (a) seems to apply only to the original selection of the President of the Tribunal. But the third paragraph appears to enlarge the meaning of the second paragraph and deals with any vacancy in the Tribunal. It runs as follows :

> "If in case there is a vacancy a Government does not proceed within a period of one month to appoint as provided above a member of the Tribunal, such member shall be chosen by the other Government from the two persons mentioned above other than the President."

This paragraph assumes that there are two persons available duly chosen by the Council. But there are not any such persons because the Council was only directed to choose them on the occasion of the setting up of the Tribunal in a case where no agreement was reached as to the appointment of the President. In my opinion on the due establishment of the Tribunal the Council in this respect became *functus officiis*. The two persons indicated in Paragraph 2, were, by that paragraph, if necessity arose for choosing them, to be available for taking the place of the President, and, by Paragraph 3 to be available for filling places vacant on the Tribunal. But no such persons had ever been appointed and in my opinion cannot now be appointed. It might be contended that if the Presidency of the Tribunal became vacant there might be a duty on the Council to appoint the President and two other persons if the two governments failed to agree, but this seems to extend unduly the meaning of Clause (a). It should be noted that the French text makes it still more clear that the Council can only intervene on failure of an agreement between the two Governments to choose the President. The French text runs :

> "Le président sera choisi à la suite d'un accord entre les

deux gouvernements intéressés. Au cas où cet accord ne pourrait intervenir le Président...

Hence I am of opinion that the case for the intervention of the Council of the League under Article 239 of the Treaty of Trianon only arises when there is a dispute as to the choice of a President for the Tribunal ; that as the occasion for the exercise of this power did not arise on the establishment of the Tribunal the Council is probably *functus officiis* in this matter but that in any event it could only arise (if at all) on the occasion of a vacancy in the Presidency of the Tribunal. In these circumstances Paragraph 3 of Clause (a) of Article 239 can only operate if it so happens (as it has not happened in his case) that "the two persons" are available. The vacancy must be filled in accordance with the Annexe I. "Should one of the members of the Tribunal... retire, the same procedure will be followed for filling the vacancy as was followed for appointing him." Paragraph 3 of clause (a) only deals with the case where this original procedure fails and it deals with it in a manner that provides no procedure that can meet the present case. The case before me is not met by Article 239. It may be that it was an intentional omission on the part of the framers of the Treaty of Trianon, or it may be that the case is not met *per incuriam*. Moreover it must be remembered that the Roumanian judge was only withdrawn in respect of a particular class of case and that there is not a vacancy at all in one sense of that term. A judge who declines to hear a particular case for adequate reasons cannot be said to have retired so as to create a vacncy. The Government appointing him may be asked to replace him but that is another matter altogether and comes under the provision of the Covenant of the League of Nations.

a) and *b*). I am therefore of opinion that under Article 239 of the Treaty of Trianon the Council of the League not only can but must refuse, in the existing circumstances, to nominate an auxiliary judge of the Roumano-Hungarian Mixed Arbitral Tribunal.

The question remains whether there is any duty of the Council under Article 11 (2) of the Covenant which would be unfulfilled by the refusal of the Council to nominate an auxiliary judge to the Tribunal.

To this question I am clearly of the opinion that the answer

is in the negative since the right of any member of the League to bring to the attention of the Council threatening circumstances affecting international relations imposes no duty on the Council to take specific action in any special case. I am, however, clearly of opinion that the Council, in pursuance of the powers bestowed on it by the Covenant of the League of Nations, is competent to secure the replacing of a judge on the Mixed Arbitral Tribunal in question. The third paragraph of Article 4 of the Covenant states in definitive terms that "The Council may deal at its meetings with any matter within the sphere of action of the League or affecting the Peace of the World". If we apply this power to a case under the second paragraph of Article 11 of the Covenant, where a member of the League has brought to the attention of the Council a circumstance "affecting international relation which threatens to disturb international peace or the good understanding between nations on which peace depends", I am of opinion that this is "a matter within the sphere of action of the League or affecting the peace of the world". The word "deal" ("connait") in Article 4 of the Covenant, in my opinion gives the Council power to arrive at practical conclusions for the purpose of preserving the peace of the world if this conclusion involves the appointment of an auxiliary judge to the Mixed Arbitral Tribunal in question, I am of opinion that the Council, in pursuance of the procedure of Article 15 of the Covenant, is entitled authoritatively to ask the Government of Roumania to replace the judge (who has been withdrawn from a certain class of case) on the Mixed Arbitral Tribunal, and I am further of opinion that a refusal to comply with this request would be followed by the penalties indicated in Article 15 of the Covenant. But I am also clearly of opinion that the Council has perfect freedom of action in this matter and that there is no duty imposed by the Covenant on the Council to appoint an auxiliary judge. But this question though answered in the negative, leads to a consideration of the second question laid before me.

Question II

Should the Council refer to the permanent Court of Justice at the Hague for an advisory opinion on the rulings which it has suggested to the litigants ?

Article 11 of the Covenant enables each member of the League to bring to the attention of the Council any threatening circumstances affecting international relations. By Article 12 members of the League agree to submit disputes either to arbitration or enquiry by the Council. Article 13 deals with the disputes which the parties to the disputes recognise as suitable for submission to arbitration. Article 14 provides for the creation of a permanent Court of International Justice "to hear and determine disputes of an international character which the parties thereto submit to it" and to "give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly". Article 15 provides that in the case of disputes not submitted to arbitration under Article 13 "the members of the League agree that they will submit the matter to the Council". This is a compulsory submission. Paragraph 2 of Article 15 states "the Council shall endeavour to effect a settlement of the dispute", and if successful shall make the facts and settlement public, "as the Council may deem appropriate". If the dispute is not settled the Council, either unanimously or by a majority vote, shall publish a "Report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto". Any member of the Council may do the same.

The facts of this case, in my opinion, come within the class of cases which Article 15 of the Covenant was designed to meet. Under Article 11, Paragraph 2, Roumania has brought to the attention of the Council threatening circumstances affecting international relations between herself and Hungary. Under Article 12 of the Covenant Roumanian and Hungary are bound to submit a dispute "either to arbitration or to enquiry by the Council". There has been no agreement between these Sovereign States, which are both members of the League, to submit the matter to arbitration in accordance with Article 13 and so the matter stands compulsorily submitted to the Council under Articles 12 and 15. It may be noticed in passing that the decision must come from the Council as it is too late now to refer the matter to the Assembly of the League under paragraph 9 of Article 15.

The Council, in the course of its endeavours to effect a settlement of the dispute, appointed a Committee of Three, who secured the unanimous opinion of six eminent jurists belonging to six different nations, and the Council held unanimously that the

report of the Committee of Three, so far as the principles formulated by the said jurists are concerned, should be adopted in order to terminate the dispute. The Council therefore requested "the two parties to conform to the three principles enumerated above". The two parties, being litigants, abstained from voting on this question (as provided by Article 15 of the Covenant) but the Government of Roumania made it clear that they accepted the report of the Committee of Three and the Government of Hungary that they rejected the report. The representatives of the two parties were asked by the President of the Council to delay giving their formal opinions until December 1927, and the Council agreed to submit the recommendations contained in the agreed report to the consideration of the governments interested and to beg them to conform to the principles included therein.

The question now is whether in these circumstances the Council of the League should refer to the Permanent Court of International Justice at the Hague for an advisory opinion on the rulings which the Council has suggested to the litigants.

I may say in passing that if the matter were referred by the Council to the Permanent Court of International Justice at the Hague for an advisory opinion under Article 14 of the Covenant and the decision of that Court was opposed to the opinion of the six jurists who have already advised the Council, and if this decision of the Permanent Court were accepted—as presumably it would be accepted—by the Council, the result would be preferential treatment of the Hungarian Optants, a result, I am instructed, which Count Apponyi specially disclaimed at the Peace Conference in 1919.

There can be no doubt that the court in question has power to give an advisory opinion upon any dispute or question referred to it by the Council. But in my opinion the Council by the submission of the report to the parties and the publication of the report, has exhausted its powers in this particular case. The Council in accordance with Paragraph 3 of Article 15 has published "a report containing a statment of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto". In my opinion it would be inconsistent with the essential dignity of the Council of the League to submit recommendations which it has declared to be "just and proper" to any Tribunal whatever for review. No doubt the Council

before issuing its report could have asked the Court at the Hague for an advisory opinion. Instead of doing so it chose in its absolute discretion to accept an opinion, which was unanimous, from six international lawyers of the highest repute. On that opinion it issued an unanimous report. If this report were now to be submitted to the Permanent Court at the Hague a precedent would be set up by which that Court would become in effect a Court of Appeal from the Council and the Assembly on combined matters of law and policy. If the Court at the Hague disagreed with the conclusions unanimously arrived at by the Council of the League it would be equivalent to a direction from the said Court to change recommendations which the Council of the League has already decided to be "just and proper" within the meaning of Article 15 of the Covenant.

The result would be to undermine, in my opinion, confidence in the action of the Assembly and the Council of the League in matters which threaten "to disturb international peace or the good understanding of nations upon which peace depends". In my opinion there is nothing in the wording of the Covenant of the League of Nations to suggest such a course of procedure. In my opinion Advisory Opinions under Article 14 of the Covenant are to be sought by the Council or Assembly of the League in order to enable a report to be made and are not to be sought for the purpose of testing a report already published.

In these circumstances I am clearly of the opinion that the Council of the League should not refer to the Permanent Court of International Justice at the Hague for an Advisory Opinion on the rulings which it has suggested to the litigants as a guide to the solution of the questions involved.

November 16th, 1927.

The League of Nations and the Mixed Arbitral Tribunals (*)

BY

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The following article was written before the last Session of the Council of the League of Nations. As it stands, it is of great interest at the present moment since it deals with a question which is pending before the League of Nations and which is of primary importance for the future of that institution.

Under the Peace Treaties, Mixed Arbitral Tribunals have been set up between each of the Allied Powers and each of the ex-enemy countries to decide certain very limited categories of disputes, which, under common law, fall within the jurisdiction of the defendant State.

The treaties have conferred a certain amount of competence on the League of Nations in regard to the constitution of these Tribunals.

The Tribunals are composed of three members : one to be appointed by each of the Governments concerned and the President to be elected by mutual agreement.

Failing such agreement, the Council of the League of Nations is called upon to appoint a President and two deputies from among persons who are nationals of former neutral countries.

(*) Translated from the French version.

Similarly, if the seat of a judge becomes vacant, and if the Government whose duty it is to fill that seat abstains from doing so, the other Government shall choose from the two persons already nominated by the Council of the League of Nations or whom it is requested to nominate for that purpose.

The vacancy envisaged by the treaties is that which arises in case of death or resignation. Experience has shown that it may also arise through the withdrawal of a judge by the Government which he represents. In this case, if there are no persons from among it can choose, the other Government has the right to request that they be nominated by the Council of the League of Nations.

In such an eventuality a question arises the importance of which has not hitherto been appreciated, to wit, must the Council, in every case, comply with the request submitted to it.

There is no doubt as to the reply if the request is not opposed by the Government having withdrawn its judge : the Council has no option, it must appoint a deputy.

The case is quite different, however, if the request is opposed by the other party : the Council cannot ignore the divergent opinions of the two Governments; before taking a decision, it must consider the various aspects of the question.

The manner in which the case has arisen in connection with the dispute between Hungary and Roumania in regard to the application of the Roumanian agrarian reform to the property of Hungarian optants in particularly interesting. The case is still pending before the Council, and is worthy of deep consideration since it gives rise to problems of the utmost gravity for the future of the League of Nations.

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The Roumanian-Hungarian dispute already ranks among the *causes célèbres* of international law. It has lasted for more than five years; has formed the subject of numerous international proceedings and given rise to interminable discussions in which the facts of the case have been lost to sight.

It originated in the agrarian reform which rendered absolutely necessary in Roumania evn before the end of the war by imperative reasons for the preservation of social welfare. Expropriations of immovable properties were consequently car-

ried out on a huge scale both in the new territories and in the former Kingdom. They affected all owners of land irrespective of nationality, foreigners and Roumanians were treated on a footing of perfect equality. Because, however, these measures affected a certain number of persons in Transylvania, who, having by the Treaty of Trianon become Roumanian nationals, had opted for Hungarian nationality, the Hungarian Government in 1922 considered itself justified in appealing to the Conference of Ambassadors. The Conference held that such claims came within the competence of the League of Nations because they referred to the provisions of the treaty relating to minorities.

In 1923, therefore, Hungary appealed to the League of Nations, requesting it in particular to decide that the Roumanian agrarian laws were illegal from an international point of view and to order the restitution of their property to Hungarian optants. The Council instructed one of its members to mediate between the two Governments with a view to reaching an agreement. Conversations were opened, which resulted in partial agreement, especially as to the compatibility of Roumanian laws with the terms of the Treaty of Trianon. But the Hungarian Government disowned its representative. The Council, however, took note of the agreement concluded and recommended the Hungarian Government to reassure its nationals and the Roumanian Government to give evidence of goodwill in regard to the interests of the Hungarian optants.

At the end of 1923, the dispute assumed another aspect : various Hungarian optants whose property had been expropriated submitted applications to the Roumanian-Hungarian Mixed Arbitral Tribunal asking that it should declare that the measures enacted against them were contrary to the provisions of Article 250 of the Treaty of Trianon and that it should order Roumania to make restitution.

The Roumanian Government pleaded the incompetence of the Tribunal on the ground that the expropriations in question did not come under the prohibition of Article 250 of the Treaty of Trianon, because they in no way constituted measures of *liquidation* within the meaning of the said text. During the deliberations in December 1926 it set forth through its representatives the reasons which led it to plead the incompetence of the Tribunal to give a decision; it declared that if the Tribunal recognised its competence it would be guilty of an obvious ex-

ceeding of powers which would render its judgment null and void; it added, moreover, that it would refrain, in any case, from submitting its reply regarding the substance of the question, but reserved the right, according to events, to adopt any décision or attitude which it might deem expedient.

By its decision of January 10th, 1927, however, the Tribunal declared itself competent and called upon Roumania to forward her reply within a period of two months.

Quite consistently, the Roumanian Government informed the Tribunal that it would refrain from submitting its reply regarding the substance of the question and that its arbitrator would no longer sit in connection with any of the agrarian matters brought forward by Hungarian nationals. At the same time, on February 24th, 1927, it submitted to the Council a request to allow it to acquaint that organisation with the reasons on which its attitude was based and, in virtue of Article 11, paragraph 2 of the Covenant, to call the attention of the Council to the fact that the principle laid down by the Tribunal, the application of which it found impossible to accept, constituted an exceeding of powers.

By a cross demand the Hungarian Government requested the Council to proceed, in accordance with Article 239 of the Treaty of Trianon, to choose two substitutes so that, ignoring the opposition of the Roumanian Government, the Tribunal could continue its work.

The Council entrusted the examination of the question to three of its members, who where to submit a report at its June Session. After hearing the representatives of the two parties, the Committee of Three endeavoured to reach a solution by amicable agreement. At the June Session, the two Governments apprised the Committee of their respective points of view. It was, however, impossible to reach an agreement. The question was therefore again postponed to the September Session in the hope that, in the meantime, a basis of agreement might be found.

If this hope is realised, the Council will have fulfilled its mission. If not, it will have the very difficult task of choosing between the two arguments under consideration, one of which asks it to appoint judges, while the other represents this as an impossibility.

In order to make this choice, it will have to determine the

nature and ambit of its powers and fully realise its responsibilities.

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The Council is faced with a twofold duty : a duty of form or procedure and a duty of substance or political expediency.

The first is indicated in Article 239 of the Treaty of Trianon invoked by Hungary : the Council must enable the Mixed Arbitral Tribunal to continue its work by appointing two substitutes.

The second is laid down in Article 11, paragraph 2 of the Covenant, invoked by Roumania : the Council's attention being called to a "circumstance affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends", it "must take any action that may be deemed wise and effectual to safeguard the peace of Nations."

At the present stage of the question, it is incontestable that the Roumanian-Hungarian dispute comes within the scope of Article 11 of the Covenant. It constitues, in fact, for the good understanding between the two countries, more than a threat, a real danger which the Council must avert by every possible means at its disposal.

If it could hope to end the dispute by appointing the judges, it would be entitled to adhere to Article 239 of the Treaty of Trianon, without paying any further attention to the aim of Article 11 of the Covenant, thus shown to be inapplicable to the present case.

Far from being able to nourrish such a hope, however, the Council on the contrary is now assured that the appointment of the judges would only aggravate the dispute. For it is certain that the Roumanian Government, which will under no circumstance recognise the competence of the Mixed Arbitral Tribunal to determine the international legality of its agrarian reform, would not accept any award which is unfavourable in regard to the substance of the question. In such case, the Hungarian Government would not fail to invoke the last provision of Article 13 of the Covenant to the effect that "In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto." The Council could not support an award which contradicted its

ruling of 1923, namely, that the Roumanian agrarian reform was entirely compatible with the provisions of the Treaty of Trianon. And the menace to peace would be infinitely greater that that with which the League of Nations is now dealing.
Between its two duties, the Council must choose the political duty, because it is the more imperative, the more urgent and the more effectual. To choose the other would be not only to abandon its fundamental mission, the safeguarding of peace, it would amount to the failure of the League of Nations, which, in presence of an international dispute, must spare no effort at mediation and conciliation to re-establish good understanding between Nations.

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There seems to be only one possible objection to this solution, which is based on simple common sense, and imposed by the logic of the League of Nations. Upon examination, however, it is shown to be absolutely wrong, both *de facto* and *de jure*.

It may be said that the refusal to allow the Mixed Arbitral Tribunal to continue its work by appointing the necessary judges would render null and void the decision by which it recognised its competence and involve the violation of an important principle of order and legality : the authority of *res judicata*. To allow the League of Nations to violate that principle would be to admit that the justice which it preaches has the fundamental rule of international relations, instead of being, as it should be in order to retain its virtue, above politics, is, on the contrary, led and dominated by them.

The reasoning appears to be plausible, but it is merely specious and, in substance, doubly false.

The principle of the authority of *res judicata* is self-imposed in modern communities as a means of ensuring order. It is only entitled to respect because it has this virtue. It is no longer entitled to respect in exceptional cases, when, instead of ensuring order, it runs the risk of disturbing it.

The French Council of State applied this idea in its decree of November 30th, 1923, on the Couitéas affair, when the French Government refused, for exceptional reasons, to support the execution of a judgment. According to the Council of State, in acting thus in that affair "it merely exercised the powers

conferred upon it with a view to the maintenance of order and public security in a protectorate country... It is the Government's *duty* to appreciate the conditions of this execution and it has the *right* to refuse the help of an armed force if it considers that order and security are thereby threatened."

Commenting on this decision, Professor Jèze (*Principes généraux du droit administratif*, 3rd Edition, Paris, 1925, pages 279-280) says : "This power of appreciation is justified by considerations of public welfare. Refusal to execute *res judicata* is a danger to social peace, since it is calculated to drive individuals to resort to violence in order to obtain justice. But execution *under any circumstances* is also a danger to social peace. Which of the two dangers is the more serious? When it is the execution which is to result in the most serious consequences for social peace, the Government responsible for social order and security *has the power to suspend or refuse execution of res judicata.*"

If this applies to *res judicata* of the national Tribunals, there is still more reason why it should apply to *res judicata* of the international tribunals and more especially to that of Mixed Arbitral Tribunals, which are quite exceptional jurisdictions. For international justice is infinitely less well organised than national justice and the disturbance of the peace of nations is infinitely more serious thant the disturbance of social peace.

Thus, even though the present case were one of *res judicata*, the League of Nations would not be obliged, in every circumstance, to ensure the execution thereof. There is more however in this case; *res judicata* does not exist. The force of *res judicata* belongs in fact only to an award which is regular and valid. Now, the award of the Mixed Arbitral Tribunal is neither regular nor valid, since that body is accused of an exceeding of powers.

It is an incontestable and uncontested principle of international arbitration that the award of a tribunal which is exceeding its powers is null and void (see Basdevant in *la Revue générale de droit international public*, 1912, p. 306; Politis, *La Justice internationale*, p. 91-92). "The arbitral award", says Fiore (above-mentioned Revue, 1910, p. 118 et seq., and p. 247 et seq.) "is not valid if the arbitror has failed to observe the terms of submission or if he has usurped a jurisdiction which was not stipulated therein." "This rule", he adds, "is imposed by the general principles of law and by the nature of things."

This solution has frequently been applied by international jurisprudence.

In the "*Betsey*" affair (United States-Great Britain, February 24th, 1804), Commissioner Gore said : "A party is not bound by the decision of the arbitrators when the case does not come within the terms of submission : such a decision is a dead letter ; it is not a decision." (De Lapradelle et Politis, *Recueil des Arbitrages internationaux*, I, 69).

In its award of July 5th, 1901, the Franco-Chilian Arbitral Tribunal, composed of three judges of the Swiss Federal Court, after having decided that it was not competent to pronounce on one of the points in the conclusions of the plaintiff, declared that if it gave an award it "would be exceeding its powers" and "that the terms of the award given on this point would therefore not have the authority of *res judicata*" (Descamps et Renault, *Recueil international des traités du* XX^e^ *siècle*, 1901, p. 357).

Finally, the judgment of the Greek-Bulgarian Mixed Arbitral of February 14th, 1927, relating to the Sarropoulos affair, contains the following passage :

"The Mixed Arbitral Tribunals are incontestably special international jurisdictions set up by the Treaties of Peace which put an end to the war of 1914-1918. Their special character obliges them to exercise the greatest caution; they cannot, on grounds of equity, exceed the limits of competence assigned to them by the spirit or letter of the Treaties. Any abusive interpretation might lead to a decision which would be voidable on the ground of an exceeding of powers and to the dangerous consequences to which M. Politis calls attention in his work entitled *La Justice Internationale.*"

The objection based on *res judicata* cannot therefore be taken into consideration since, if the decision of the Tribunal is voidable on account of an exceeding of powers, it is inexistent and inoperative.

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On this line of argument, another objection is conceivable. It might be claimed that in order that the existence of the alleged exceeding of powers may be admitted, it is not sufficient for it to be asserted by one of the parties; it must also be certified by a third authority whose decision can be legally binding

on the other party. This authority, however, cannot be the Council of the League of Nations since it has only political jurisdiction, whereas the problem to be solved is essentially of a juridical nature. The only authority qualified to take a final decision in the matter is the Permanent Court of International Justice. The Council is therefore obliged to consult that body.

The argument would be perfectly legitimate if international organisation had reached the same state of perfection as international organisation, in which the separation of powers forbids political authorities to intervene in judicial matters.

In international affairs, however, even with the creation of the League of Nations, we are far from having attained such a degree of organisation.

Prior to the creation of the League of Nations, when there arose the question of quashing a decision voidable on the ground of exceeding of powers or of a treaty which had lapsed owing to a change in circumstances, there existed no suitable procedure whereby a dispute arising between sovereign States on this question could be definitively settled; the difficulty had to be settled by amicable agreement. Any party which objected to a decision on the ground of an exceeding of powers, or pleaded the clause *rebus sic stantibus* against a treaty, could not expect to be taken at its word; it was therefore necessary to begin by convincing the opposing party or other contracting party in order to obtain its agreement that the decision or treaty should be annulled. If, however, the applicant encountered obvious ill will on the part of the opposing party, it was recognised that he could disregard that attitude and follow the course which he considered himself entitled to follow, since there was no rule compelling the parties to submit their dispute to the examination of an impartial third party.

The creation of the League of Nations marked a certain progress but that progress is limited and only relative. It is no longer possible for parties to settle their dispute alone; they are obliged to submit them to a third party. This third party however need not necessarily be a judicial authority. Recourse to judicial proceedings is merely recommended to the parties (Articles 12 and 13 of the Covenant); it is not imposed upon them. If they do not agree to adopt that procedure, they must at least lay their dispute before the Council, either in virtue of Article 11 or in virtue of Article 15 of the Covenant.

The intervention of the Council constitutes a guarantee in that the mere will and pleasure of States is no longer recognised. This intervention is however no more than an expedient since it takes the place of that of a judicial body. This state of affairs will continue so long as international justice is not made obligatory.

It is therefore the duty of the Council and of the Council alone to examine the question whether the Tribunal has really exceeded its powers as claimed by the Roumanian Government.

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Not only has the Council the power to undertake this examination , it is its duty to do so, for it cannot contemplate appointing the judges until it has assured itself that the Tribunal has not exceeded its powers in the present case. Otherwise, it would be committing a most flagrant injustice towards Roumania, and in so far as itself is concerned, a veritable act of suicide, since it would be giving to a tribunal which has outlawed itself the opportunity of exercising usurped functions and of taking decisions destined to remain dead letters.

Appealed to under Article 11 of the Covenant, the Council has, in this respect, entire freedom of action. Article 11 is the practical application of Article 4, paragraph 4, which provides that " the Council may deal with any matter within the sphere of action of the League or affecting the peace of the world. " One writer has said that its scope is " of incommensurable breadth " the functions which it assigns to the League are, so to speak, unlimited " (R. Redslob : *Théorie de la Société des Nations,* Paris, 1927, p. 50).

"Article 11", says the same author (p. 51) "is the most striking manifestation of a tendency which runs throughout the Covenant and which consists of giving only general direction and allowing as wide a scope as possible for subsequent experience. "

"In virtue of this text", says another author, "the Council may *propose any solution* which it may deem best calculated to safeguard the maintenance of peace. " (M. Gonsiorowski, *La Société des Nations et le problème de la paix,* Paris, 1927, Vol. II, p. 329).

In order to solve the previous question of the exceeding of

powers, the Council, under Article 11 taken in conjunction with Article 14 has the right to consult the Permanent Court of International Justice. In fact, however, there are very serious objections to the exercise of this right. It must first be noted that a question which is not one of simple procedure cannot be referred to the Court except by unanimous decision, which is scarcely possible. Another factor which may prevent the Council from adopting this course is the conviction of the inefficacy of such a procedure. For the reasons set forth before the Court by its representatives in 1923 the Roumanian Government will maintain its opposition to such a measure. In these conditions, it may be anticipated that it would not accept an unfavourable opinion. The Council could not ignore it and appoint the judges without, as stated above, creating a deadlock of the utmost danger both to its prestige and to the maintenance of peace.

Moreover, the Council is bound by its own jurisprudence in the affair, for, as early as 1923, owing to the opposition of the parties concerned, it decided to waive its right to request an advisory opinion from the Court.

The Council must therefore seek other means of enlightenment. If it finds that it has need of technical advice to assure itself as tho the existence of an exceeding of powers, the simplest course would be, following a practice which has frequently been adopted, to consult a Committee of Jurists chosen by itself.

Once convinced that the Tribunal has exceeded the limits of its competence, the Council will be obliged to refuse to appoint the judges and will have to seek the most suitable means by which to re-establish good understanding between Hungary and Roumania.

Even in 1923, the Council was convinced that the political side of the question outweighed the juridical side. M. Mandelsta admitted it in the course of lectures which he gave at the Hague Academy of International Law in 1926 on " International Conciliation under the Covenant and the Jurisprudence of the Council " (these lectures will be published in Vol. IV of the *Recueil des Cours de l'Académie pour* 1926). He adds : " It is this conviction which led the Council, being moreover apprised in application of Article 11, to resort, in preference to legal measures, to measures calculated to relieve the tension between the two parties to the dispute. "

The development in the affair of the optants since 1923 is such

as to strengthen the Council in the same conviction and to urge it to confirm its previous conclusions.

Faced by a duty of procedure and a political duty, obliged for the reasons set forth above to choose the latter, it must refuse to appoint the judges claimed by the Hungarian Government unless it finds a way, with the consent of the two parties concerned, of laying down rules which enable the Tribunal to continue its work in conditions of such a nature as to avoid any further exceeding of powers in respect of the substance of the question.

The Agrarian Reforms in Roumania and the competence of the Mixed Arbitral Tribunals[1]

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PRELIMINARY OBSERVATIONS

In the present survey we are mainly concerned with a question of competence, although we shall afterwards indicate the peculiar situation which has arisen in consequence of the decision whereby the Roumanian-Hungarian Mixed Arbitral Tribunal declared itself competent, and the solutions which appear to be necessary. The question arose thus : A general agrarian reform had been decreed in Roumania. This reform constituted, it must be said, a veritable expropriation for reasons of national welfare, and this in return for compensation which, although adequate at the outset, became insufficient owing to the fall in the exchange after the decree of expropriation. Was this serious measure, which was naturally extended to property situated in Transylvania and Bessarabia, aimed especially at the Hungarians? We might abstain from examining this question in detail, since we are dealing with questions of competence only. Nevertheless we shall say a word on this subject also. The necessity for agrarian reform had been recognised by Roumania before the war. It had been under consideration even before 1913. But,

(1) An Article which appeared in the *Revue de Droit international et législation comparée*, N° 4, 1927. Translated from the French version.

in September 1913, M. Bratiano, the head of the Liberal Party, announced in a public communication, that he would make expropriation one of the essential points of the programme of his future Government. In January 1914, he became Prime Minister. In May 1914, the constitutional elections took place. To make this expropriation possible, the Constitution had, indeed, to be revised, since, according to the existing Constitution, expropriation was authorised only in clearly defined cases, and the simple plea of social necessity was not sufficient. A remarkable thing happened : although the electoral body was a restricted one, the greater number of the votes being held by the landed proprietors, an imposing majority was obtained for revision of the Constitution, *for the purpose of expropriating a large proportion of the land* held by the large landowners. No one can say that this refom was directed against the Hungarians of Transylvania, which was not joined to Roumania until many years later, as a result of events which could not have been foreseen. Nevertheless, behind all the arguments sustained by the Counsel of the Hungarian Government before the Hungarian-Roumanian Mixed Arbitral Tribunal, is the idea that this expropriation was directed against Hungarian subjects settled in Transylvania. It is true that there could be no thought, especially in May 1914, of the almost complete expropriation of the large landowners in Transylvania, which has since been accomplished. But the principle was already propounded and accepted. Then came the Great War. Roumania remained neutral for a time. Then she took up arms, and when, in 1917, the Roumanian Army, after brilliant successes, met with defeat owing to Russia's defection, when two-thirds of the Roumanian territory were invaded, it was considered that it was a necessity for the defence of the country to proceed at once to the legislative task of expropriation. This would strengthen the interest of the peasant class (which had been freed from hateful serfdom only half a century before) in the defence of Roumanian soil. Complete abstention would have seemed to imply forgetfulness of the promises of 1914. It was H.M. the King of Roumania who, by a message addressed to the soldiers in the trenches in January 1917, announced that expropriation would take place without delay. Was it then known, could it then be foreseen, that Transylvania, the immense majority of whose population was Roumanian, would be annexed to Roumania? Could it be

foreseen that the great agrarian scheme of reform introduced into Roumania would one day be extended, by the force of circumstances, to Transylvania, in consequence of military successes which did not seem very imminent; and can it be supposed that all these new reforms were directed against the Hungarian owners of property situated in Transylvania? Would it have been possible to abstain later on, however, on some pretext, from extending the effects of this law in Transylvania to foreigners, and consequently to Hungarians, when they were incontestably affected by it under the former monarchy? Could they be given favoured treatment as compared with Roumanians who were subject to this measure? It is clear that such an attitude would have incensed the Roumanian population all the more as Transylvania, which formed part of Hungary, had, after all, been conquered when Hungary was conquered. It was natural that the Roumanian subjects should be affected by the measure; besides, one of the instructions issued by the Government contained the following fundamental provision : " As the law makes no distinction between owners according to nationality, it is obvious that it is immaterial whether they are nationals or foreigners. Nor can you, in consequence, apply the law in different ways "; and further on : " Property liable to expropriation must be considered, *irrespective of nationality* or domicile, as property belonging to absentees." The facts, moreover, belie the accusation of alleged partiality in the treatment meted out to Roumanians and foreigners when the expropriation was put into effect. The King was the first to feel the effects of it. All the arable crown lands were expropriated. The same fate befell the whole of the arable land of the Roumanian Academy and the Roumanian hospitals. And in its protest of March 1927 to the Council of the League of Nations, the Roumanian Government gave some particularly interesting examples of expropriation experienced not only by Roumanians but by Roumanian women who had married foreigners and who were expropriated *in toto*, and by foreigners who have had the same treatment but who submitted without protest. Among Roumanan subjects we may cite : Carlo Rasti, 1,000 hectares; Leonita Economo, 1,365 hectares; Hélène de Reineck, 2,614 hectares; Demètre Mavrocordato, 900 hectares; Emile Racovitza, 1,123 hectares; among Roumanian women married to foreigners : Euphrosine Bengesco, 321 hectares; Marie Ghica, who became

Baroness Skenkerensty, 1,645 hectares; Zoé Alexandresco, 17,404 hectares; Marie Stribey, Baroness Blome, 14,177 hectares; Marie Bibesco, Countess Montesquiou, 19,307 hectares; and finally among foreigners : Mme Dauphin (French), 233 hectares; Herman Junger (Czechoslovak), 440 hectares; Jecu Nicolici (Serbian), 4,074 hectares; Arghiropolos (Greek), 2,184 hectares; Prince Mario Ruspoli (Italian), 4,240 hectares. All these Roumanians and all these foreigners submitted to their expropriation because they understood that it was dictated by sheer necessity. No doubt they would all have protested, objected, and interested their Governments in their objections, if they had not believed that, hard hit as they were by the Roumanian agrarian reform, they must bow to the inexorable demands of a situation which was explained by the economic history of the country and had been singularly aggravated by the appalling upheaval caused by the world war.

We shall confine ourselves for the present to this simple statement of facts. We do not intend to discuss the rather absolute theories of the learned authors of the opinions pronounced by the Counsel of the Hungarian Government, which aim at showing that in spite of the express provisions of the majority of the codes on the sovereign right of a State to regulate the regime of property situated in its territory and forming an integral part of that territory, in spite of the general principles imparted on this subject by the majority of authors, a State has the right to protest when its nationals are adversely affected by measures which seriously impair their right of ownership over their immovable property situated in a foreign country, even when these measures equally affect all the subjects of the foreign State. It is possible that in certain cases these protests may be justified. We shall make no pronouncement on this thorny point. It would carry us too far and would be outside the scope of the survey which we propose to make. We shall merely state that, in our opinion, it would be necessary in any case to make distinctions. The *distinguo*, for which the Jesuits are so often criticised, is obligatory for the jurist, and it might almost be said that the law lives by distinctions. One might perhaps admit the intervention of a State in the internal legislation of another State, with regard to the régime for the immovable property situated in the territory of the latter, if it were a case of measures

prejudicing the rights of its nationals which were obviously inspired only by purely fiscal interests, or by a desire for the enrichment of the Treasury at the expense of private persons. Even so, we should make reservations. The case might be imagined, and it is no idle hypothesis (it is on the way to realisation), of a State imposing on all the property situated in its territory an absolutely exorbitant real estate tax, and raising the transfer or death duties to such an extent that the duty itself would become almost illusory or disappear after a certain figure. Anything is possible in the times in which we live, and it is certain that even in comparatively prosperous countries, well advanced in civilisation, there is a tendency towards a more and more strict limitation of private property. There may however be merely a financial interest behind these measures. Even so, it would be difficult to admit that a State has the right to protest because its subjects are prejudiced by an excessive real estate tax on their property situated abroad, if they are sharing the common fate of all who possess property in that country, and if the nationals themselves are not exempt from it. But if more radical measures still have been taken in the country in question in a higher interest, if they have been dictated by social interests of the highest order, by necessities of public welfare, of national welfare, and not merely with a view to financial gain, if they affect all the owners of immovable property situated in that country, then it can scarcely be admitted that a foreign State may claim privileges for its nationals.

We do not intend, however, to discuss these serious questions in full. They have been sufficiently debated before the Hungarian-Roumanian Mixed Arbitral Tribunal, in brilliant speeches, and numerous authors have been quoted by both sides. On both sides learned opinions have been produced leading to absolutely contradictory conclusions. Why did they have this result? Why were they bound to have it? Because they were too general and too categorical, or sometimes merely because it was not realised that the authorities from whom they emanated subordinated their conclusions to reservations which consecrated precisely the needful distinctions already mentioned. To quote but one example, we note that Paul Fauchille, whose opinion is expressly invoked by M. de Lapradelle in support of his argument (p. 90 of his collection), is the very authority whose opinion is

invoked by M. Rosental, one of the Counsel of the Roumanian Government in support of his. How is this? Simply because M. de Lapradelle confined himself to taking one sentence out of Paul Fauchille's work : " If many think that a State, when organising its internal Government, can, without provoking intervention on the part of the other States, deprive its nationals of rights which are at the foundation of modern civilisation, such as the right of ownership, the majority, on the contrary, consider that it cannot act thus towards foreigners in its territories, without calling forth legitimate protests from the State to which they belong." He did not see that Paul Fauchille, expressing his personal opinion, declares definitely that the foreigner " must enjoy the maximum of the rights which he can possess, that is, all those from which he is not debarred as a foreigner, or through the State's right of conservation." And he adds : " In any case, it may be said in this connection that a State cannot give foreigners a more favourable position than its own subjects, *for it is inconceivable that in any country the subjects should be treated less favourably than those who have no part in it.* "

We shall confine ourselves to these few observations concerning the difficult position in which the Mixed Arbitral Tribunal would be placed if its competence were acknowledged. These observations were not unnecessary. They make clear what would be the task of this tribunal, indubitably created for the purpose of settling certain difficult questions arising out of the war, as between former belligerents, this ephemeral tribunal which would be called upon to decide, not on essentially temporary measures, but on the most important questions of international law, questions which may arise in peace time and which once settled may bind them indefinitely.

Once more, however, we must declare that although it is possible to discuss endlessly the legality or illegality of the Roumanian agrarian reform, from the point of view of international law, this question does not concern the problem of competence, and it is the problem of competence which we intend to discuss, but with a reservation as regards the substance, which we shall be able to deal with later.

The enormous difficulties raised by the substance of the question were recently illustrated by the very animated discussions

which took place at Lausanne last September, during the last session at Lausanne. An excellent account of these was given in *Le Temps*, first by M. de Lapradelle, and afterwards by M. Blociszewski. M. de Lapradelle is delighted at the resolutions adopted by the Institute. We consider that, taken as a whole, they deserve approval. It is certain however that, to begin with, they have not the slightest connection with the question of the competence of the Mixed Arbitral Tribunal to give a ruling on such serious questions. As to the substance, they are absolutely in accordance with the opinion which we have expressed : that in such a matter, too rigid rules must be avoided and that it is necessary to make distinctions, according to particular cases. Moreover it is evident, as the discussion shows, that practically all that was aimed at was the protection of foreigners against damages which they might sustain in a given country, owing to the apathy of the officials entrusted with the protection of individuals against acts of aggression, whether voluntary or involuntary, or owing to the disorganisation of the police or of the public forces. Foreigners must have at least the same rights as nationals. It is not stated that they must have more. The country owes, according to Article 3, the same protection to foreigners as to its nationals. But M. de Lapradelle is quite incorrect when he claims to deduce from the very wise rules accepted by the Institute, that this assembly of jurists meant to guarantee foreigners against expropriation for reasons of public welfare affecting all property situated in the territory of the State which decrees it and affecting nationals in the same way as foreigners, and among its nationals the sovereign himself. " The illustrious Society," says M. Blociszewski, which, like ourselves took part in the debate, " passed these resolutions in the complete independence of its scientific convictions. In passing them, it had no concrete case in mind; it was considering no one country more than another; above all, it was not thinking of any actual international dispute. If we venture to insist on this point, it is because some stir seems to have been caused in certain scientific or political circles by the article which our eminent colleague published in the *Temps* of Monday, September 5th, and in which, with his customary skill, he appeared to indicate a connection between the decisions taken at Lausanne by the Institute of International Law and the dispute which has arisen between Roumania and Hungary regarding the application of the Roumanian law to

the Magyars of Transylvania who have lost their Hungarian nationality."

Nothing could be more accurate than these observations. But there is another point in this discussion which must be borne in mind; that is, that the resolutions drawn up by the Institute *merely express a hope*, and this hope is to see consecrated in the practice of international law the rules which it proposes with regard to the responsibility of States for damages caused on their territory to the persons or property of foreigners, when there is peace between these States. How can this hope be realised? By whom can it be realised? The Institute was careful to answer this question. First of all by an international Commission of Inquiry, if this is necessary to examine the facts; then, by a procedure of conciliation; finally, if nothing comes of this, by judicial proceedings before the Permanent Court of Arbitration, the Permanent Court of International Justice or some other international jurisdiction, with a view to a definitive solution. That it ever occurred to the Roumanian Government to entrust so serious a mission to a Mixed Arbitral Tribunal created solely to judge disputes arising out of the war, or that it is the mission of this tribunal to lay down the law, to define international law by regulating it for the present and for the future, is, however, quite out of the question. We do not, of course, mean to speak ill of the Mixed Arbitral Tribunals; we have good reasons for not doing so. But texts apart, it seems to us unheard of for the Roumanian-Hungarian Mixed Arbitral Tribunal to be entrusted with the mission of international legislator, especially in peace time, between Roumania and Hungary. For that is what it amounts to. Who constitute this Tribunal, after all? A Hungarian judge, a Roumanian judge and a neutral president. Now although as a general rule — I speak from personal experience — when it is a question of awarding justice on a matter of private interests, the members of the Tribunal almost always come to an agreement with ease, the national judges must cease to be national when it comes to fixing the international law between two countries, to dealing with questions which inevitably affect political interests of the highest importance, if they are to define the international law between two countries. The redoubtable task, generally confided to a Congress, or to Commissions entrusted with the preparation of a Treaty, of laying down the international law between Roumania and Hungary, and that for the

future as well, would thus devolve upon a single judge, a neutral judge, who may be a very good jurist, but who is not a shining light of international law. The Treaty contains no article to this effect.

We have finished examining the conditions under which the expropriation for reasons of public welfare, or rather of public safety, was decreed in Roumania. We would here recall once more that the measure has been wrongly represented as aimed at the Hungarians. The Roumanians are as hard hit as the Hungarians. It is true that mistakes may have been made, and have been made. Hungarians who claimed that they had worse treatment than the Roumanians have appealed to the Roumanian tribunals *and have won their case.* Awards in their favour have been mentioned by the Counsel of the Roumanian Government. And to put an end to these false statements, M. Titulesco, the Roumanian Delegate made the following declaration in Brussels, which he renewed at Geneva : " *If, in practice, other circumstances being equal, the Agrarian Law of Transylvania has been interpreted in a different manner for Hungarian optants than for Roumanian subjects, each individual case, when brought to the notice of the Roumanian Government, will be considered separately, in order to ensure equal treatment for all in conformity with the intentions of the law.* "

It is to be hoped that this clear statement will put an end to the incessant assertions by the Hungarian Government and its Counsel that the agrarian law is "directed against the Hungarians ", an assertion which is the more absurd as the King of Roumania himself, like the humblest of his subjects, was affected by it, as we have said above.

The foregoing survey was necessary. It makes it possible to realise the circumstances in which the question of competence has arisen and the nature of the protests on which the Mixed Arbitral Tribunal would have to pronounce judgment, if, as this tribunal has decided, it is really competent. We shall next glance at the difficulties which will have to be faced as a result of this truly unjustifiable decision.

INCOMPETENCE OF THE MIXED ARBITRAL TRIBUNAL

A certain number of claims brought by Hungarian subjects against the Roumanian Government were before the Mixed Arbitral Tribunal. These Hungarian subjects were Emeric Kulin,

and others. *On behalf of the Roumanian Government*, its agent opposed *in limine litis* an exception of incompetence to the claim. *On behalf of the claimants*, the agent general of the Hungarian Government contested this exception. It does not appear, however, that the Hungarian Government was ever party to the suit. It was never concluded in its name. We do not intend to discuss here the somewhat curious consequences which may ensue. We shall merely say that it is evident that the award to be given will not have the force of *res judicata* either to the advantage of all parties concerned except the claimants or to that of the Hungarian Government. We shall deal hereafter only with the exception of incompetence and with no other. We think that the Mixed Arbitral Tribunal was fundamentally incompetent to give a ruling on the questions submitted to it by the Hungarian Government.

Some general observations will suffice to demonstrate this, without any need for analysis or minute examination of the texts. The Mixed Arbitral Tribunal is an exceptional jurisdiction. It could be competent only in cases in which its competence is determined by a definite text. It seems superfluous to insist on this point. The claimants therefore maintain, in general, that its competence, in the present hypothesis, rests on Article 250 of the Treaty. This is the opinion expressed by certain learned jurists also, by M. Pillet, for instance, to whose indisputable authority the claimants have referred in support of their general argument. Unfortunately, as regards the interpretation of Article 250, M. Pillet's opinion, which is very brilliant, although incorrect, we consider, as regards the substance of the law, omits all examination or serious analysis of the article in question. He has not seen that Article 250 is in close relation as the very text of it states, with Article 232; that the measures from the effect of which it exempts Hungarian nationals are the very measures which constituted an obligation for them under Article 232, and that the measures which constituted on obligation for them by virtue of the latter article are the very same exceptional war measures defined by paragraphs 1 and 3 of the Annex, It is true that this fact has not escaped the penetrating analysis of M. de Lapradelle, but he indicates a series of other cases in which, in his opinion, no text exists. "In all cases where there is no text, general principles suffice." We cannot concur in this opinion.

If there is really no text in support of the jurisdiction of this *very exceptional* tribunal, the Mixed Arbitral Tribunal, then it has no competence and no jurisdiction. This is what, in our opinion, the general principles lay down. If then, the competence of the tribunal does not result clearly from the text of Article 250, it cannot be claimed for it in virtue of these general principles which are so skilfully and so prudently relied upon, it seems, for the event of the argument drawn from the text of this article finding no favour. Let us beware of general principles. They no doubt have their value, but they are dangerously elastic. And let us confine ourselves to Article 250 of the Treaty, on which is based the alleged competence of the Mixed Arbitral Tribunal to decide as to the validity of an act which has nothing in common with the war, which was planned long before the war and on which the Roumanian Government decided only under the irresistible pressure of a highly dangerous situation.

The first part of Article 250 runs as follows :

"Notwithstanding the provisions of Article 232 and the Annex to Section IV the property, rights and interests of Hungarian nationals or companies controlled by them *situated in the territories which formed part of the former Austro-Hungarian Monarchy* shall not be subject to retention or liquidation in accordance with these provisions.

"Such property, rights and interests shall be restored to their former owners freed from any measure of this kind, or from any other measure of retransfer, compulsory administration or sequestration, taken since November 3, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measure in question.

"Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239."

Article 250 of the Treaty of Trianon expressly refers to Article 232 and to the Annex to Section IV. By an exceptional privilege, which according to M. Millerand is excessive, it frees Hungarian subjects from the various kinds of confiscation which they would otherwise have suffered. From the actual text it may be concluded that the measures of liquidation or expropriation from which Hungarian subjects are freed by way of exception are those provided for and laid down by Article 232 and by

certain provisions of Section IV. The exception by which they benefit applies to no other measures. Hence the inescapable conclusion that the competence attributed to the Mixed Arbitral Tribunal affects only exemption from *measures provided for and regulated by the articles to which it refers.*

What are these measures? Is there the slightest allusion to the measure which would constitute a general expropriation, in return for compensaion, inadequate no doubt, but nevertheless recognised in principle, of all immovable property of a certain importance belonging to the subjects of the expropriating State, as well as of that belonging to any foreigners whatsoever, and not only to conquered belligerents?

There is not ; for no formal provision of the Treaty was required for the purpose. It would have been completely superfluous. It is common law. The Roumanian Government did not base its action on any provision of the Treaty. It based it on the elementary rule whereby immovable property, even if it belongs to foreigners, is regulated by the law of its situation, a rule accepted by all legislations and recognised by all authors. It is possible to discuss endlessly, and this has been done abundantly, whether, in virtue of the principles of international law, a State on behalf of its nationals or these nationals themselves can protest and have their protests recognised, when they maintain that these nationals have been prejudiced by an iniquitous application of this rule in a foreign country to property which they possess there, but the principle itself in incontestable and uncontested. Is it possible to suppose for a moment that a conquering State could think it necessary to insert it in a treaty concluded with a conquered State?

We do not attach much importance to the fact that Article 250 made use of the word liquidation rather than the word expropriation. In our opinion a liquidation, in the meaning of this article, is an expropriation. It is at any rate the consequence of one. But this expropriation is such as can take place in the absence of any treaty provision. It is not the expropriation for reasons of public utility of property situated in the territory of a country, affecting not only enemy aliens but even friendly aliens, even aliens of any kind whatsoever, and even subjects of the country having recourse to this measure. For expropriation of

that kind no text was required, and it would have seemed truly strange if it had been thought necessary to insert it in an international convention putting an end to the war and determining the respective obligations and duties of the former belligerent States. It would have been still more absurd if the conquered State had been placed in a privileged position in this respect, not only as regards all the other foreigners, but as regards foreigners belonging to Allied and equally victorious countries, the blood of whose subjects had been shed in the common cause, and even as regards the subjects of the State itself, which had benevolently renounced a right consecrated by general principles of international law. For there is certainly no author who does not recognise this right, at least in principle.

This observation suffices to destroy completely the claims put forward by the brilliant Counsel for the Hungarian Government. Nevertheless it has not been made, we believe, and it is decisive. Let us sum up our arguments :

1) Article 250 has freed the Hungarian Government only from the retention or liquidation authorised or prescribed by the provisions of Article 232 and by the Annex to Section IV of the Treaty;

2) There was no necessity for these provisions to consecrate, on behalf of the Roumanian Government, the right to expropriate for reasons of public welfare, the Hungarian property situated in territory which had become Roumanian through annexation;

3) The inapplicability of Article 250 of the Treaty to the question of expropriation for reasons of public welfare obviously follows, since this article only exempted the Hungarian State from the consequences of Article 232 and Section IV, which do not and cannot concern expropriation for reasons of public welfare.

This should suffice and we could stop here, for the foregoing demonstration seems to us conclusive. It is certain, moreover, that Article 232 of the Treaty does not mention expropriation for reasons of public welfare any more than Article 250. But we think that the most detailed examination of these articles can lead to nothing but the complete confirmation of the observations made above. Article 232 is extremely condensed. Some of its

provisions are not in any way concerned with Hungarian property and do not allocate it to the Allied Powers at all, for instance Article 232 A. Under Article 250, it is only necessary to consider the property and interests of Hungarian nationals or of companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy, that is of Transylvania. But the fundamental rule, and the only one which immediately concerns us, is that of Article 232 B, which runs as follows : " Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests which belong at the date of the coming into force of the present Treaty to nationals of the former Kingdom of Hungary, or companies controlled by them, and are within the territories, colonies, possessions and protectorates of such Powers (including territories ceded to them by the present Treaty) or which are under the control of those Powers. "

This is certainly the most important provision of Article 232 concerning the right given to Roumania over property belonging to Hungarians in general. The others are only concerned with the property of Roumanian nationals and not that of Hungarian subjects, except the provisions of Article 232, paragraph D, of which we shall speak in a moment. As regards Article 232, paragraph B, it is obvious that it only constitutes a simple right of retention and appropriation of Hungarian property existing in the territory of the Allied and Associated Powers, and that this has not the slightest connection with the right of expropriation for reasons of public welfare which every State possesses over the immovable property situated in its territory, whether it belongs to nationals or to foreigners. It is certain that the object, and probably the principal object, of Article 250 was to exempt Hungarian property from this right of retention and from the right to liquidate it, or in other words to alienate it, for this liquidation is after all nothing but alienation or a form of alienation. Once more, what can there be in common between this and expropriation for reasons of public welfare? Nothing surely. It is a simple right of retention which, under Article 232 C, can only be exercised in return for compensation, but which is in no way subject to the condition of public welfare. It is in no way an expropriation for reasons of public welfare.

Next comes the provision of Article 232, paragraph D, which runs as follows : " As between the Allied and Associated Powers and their nationals on the one hand and nationals of the former Kingdom of Hungary on the other hand, as also between Hungary on the one hand and the Allied and Associated Powers and their nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty. "

Let us now see how these measures are defined in paragraphs 1 and 3 of the Annex. In reality, paragraph 1 contains no definition of exceptional war measures and measures of transfer, and it is paragraph 3 which defines them. Paragraph 1 none the less contains interesting indications on what is understood in the Treaty by exceptional war measures and especially by measures of transfer. Here is the complete text : " In accordance with the provisions of Article 232, paragraph D, the validity of vesting orders and of orders for the winding up of businesses or companies, and of any other orders, directions, decisions or instructions of any court or any department of the Government of the High Contracting Parties made or given, or purporting to be made or given, *in pursuance of war legislation with regard to enemy property, rights and interests* is confirmed. The interests of all persons shall be regarded as having been effectively dealt with by any order, direction, decision or instruction dealing with property in which they may be interested, whether or not such interests are specifically mentioned *in the order, direction, decision or instruction.* No question shall be raised as to the regularity *of a transfer of any property, rights or interests dealt with in pursuance of any such order, direction, decision or instruction. Every action taken with regard to any property, business or company,* wheter as regards its investigation, sequestration, compulsory administration, use, requisition, supervision or *winding up, the sale* or management of property, rights or interests, the collection or discharge of debts, the payment of costs, charges or expenses, or any other matter whatsoever, in pursuance of orders, directions, decisions or instructions of any court or of any department of the Government

of any of the High Contracting Parties, made or given, or purporting to be made or given, *in pursuance of war legislation with regard to the enemy property, rights or interests*, is confirmed... "

All this is very significant. The measures of transfer in question here are those accomplished in virtue of exceptional war legislation, hence exceptional war measures. This is repeated in almost every line. It matters little that certain exceptional war measures may to some extent hamper or limit the liberty even of neutrals. The essential characteristic of exceptional war measures is that they have been taken owing to the war and for war purposes. They do not cease to be exceptional war measures when they affect the liberty of action, movement or even profession of a neutral.

It is therefore very certain that, according to the express terms of this article, the right of a belligerent to liquidate, to effect a *transfer of property* (to use the actual words of paragraph 1 of the Annex), in other terms *to dispose of it*, can arise only out of exceptional war legislation concerning property, rights and interests. It is therefore very much an exceptional war measure. This said, let us take paragraph 3 of the Annex. We shall quote it in full as we quoted paragraph 1. It is as follows : " In Article 232 and this Annex the expression "exceptional war measures' includes measures of all kinds, legislative administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees."

"Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation or devolution of ownership in enemy property, or the cancelling of titles or securities. "

This is the text and, from this text, the Counsel of the Hungarian Government conclude that the fact of disposing of enemy property is not an exceptional war measure. Paragraph 3 of the Annex to Article 232 of the treaty speaks, indeed, in its first subparagraph of the right of disposal. They forget, however, or they have failed to notice that paragraph 1 of the Annex has already clearly defined the character of the right of disposal. It is the right which results from the *exceptional war legislation.* It says so in express terms. Hence the ingenious reasoning which they have built up on this error falls the ground.

No, Article 232, paragraph D, was never intended to confer upon a belligerent the right to dispose, on any pretext soever, of the property of an adversary. It gave him the right to do so *in virtue of exceptional war legislation.* This is expressly stated in paragraph 1 of the Annex to which Article 232 refers. And it is from this prejudice to his right of ownership that the Hungarian is freed, from this prejudice which would be caused to it by exceptional war legislation. But we cannot see any reason why, in Article 232, it should be found necessary to stipulate that Roumania, like any other State, had the right of expropriation for reasons of public welfare, and we note that no such stipulation is made. This Article merely mentions and validates the case of expropriation resulting from exceptional war measures. It is still more impossible for us to understand why the Treaty should grant to the nationals of the conquered State, by an unheard-of privilege, exemption for ever from expropriation for reasons of public welfare, or even of national welfare, which the subjects of any State are liable, as regards their property situated abroad, to suffer at the hands of the State in which it is situated. As we have just shown, Article 250 of the Treaty is not in the least concerned with this. Hence the Mixed Arbitral Tribunal is not competent to pronounce judgment on protests which may be brought forward by Hungarian nationals, on account of an expropriation for reasons of public

welfare which they have suffered in Roumanian territory, since its competence is invoked solely in virtue of Article 250, which has nothing to do with the question. As to the Annex to Section IV, to which Article 250 also refers, it will suffice to point out that this reference is absolutely identical with the reference to Article 232, for it is precisely in this Section IV that we find Article 232 and its Annexes, which we have just analysed in detail.

In his remarkable speech, our eminent colleague, M. Gidel, analysed at length Award No. 7 of the Permanent Court of International Justice, between Germany and Poland. We might point out, first of all, that the case submitted to the Court was complicated by the Geneva Convention. In the case of Germany and Poland, as M. Gidel himself pointed out, the texts to be applied were contained in two different diplomatic instruments : the Treaty of Versailles and the Geneva Convention. But without going into the difficulties to which it may give rise from the point of view of the substance of the question, we shall confine ourselves to observing that the Permanent Court did not deal at all with the question of the competence of the Mixed Arbitral Tribunals. All the same, and this is rather amusing, this award, quoted and analysed at great length by M. Gidel, although it has nothing to do with the competence of the Mixed Arbitral Tribunal, has nevertheless supplied M. Politis with a rather interesting argument concerning the real bearing of the Treaty provisions, Articles 232 and 250, and the nature of the provisions which first subject Hungarian nationals to the measures prejudicing their rights of ownership and then exempt them from these measures. If the latter are not to be found in the Treaty of Versailles, the former are certainly to be met with there. Here is what the award says about them : " The regime of liquidation instituted by the Treaty of Versailles is aimed at German property as such. " If aimed at German property as such, it has nothing in common with expropriation for reasons of public or national welfare, which affects without distinction all property, all assets, situated in the country which decrees it, whoever the owner may be.

But since the Counsel for the Hungarian Government have dwelt at such length on Award No. 7 of the Permanent Court of International Justice, although it does not even touch upon the

question of the competence of the Mixed Arbitral Tribunals, we think that it is our duty to reproduce some of the observations of M. Politis on the real bearing of this award :

" In this affair, it was a question of the treatment of German property in Polish Upper Silesia. A special convention concluded between the countries concerned at Geneva, on May 15, 1922, defined and regulated the right of liquidation exercised by the Polish Government over German property. Article 6 of that Convention lays down to what extent and under what conditions the Polish Government may liquidate German property in Upper Silesia.

" The Court came to the conclusion, when interpreting the Convention of 1922, that apart from the cases provided for in which liquidation is permitted, German property in Upper Silesia cannot be liquidated. It hastened to add, however, as we must not fail to note, that German property is none the less subject to common international law. If it escapes liquidation as German property, it may perfectly well be expropriated as foreign property (1). The following is the essential passage of this award; it may be found on page 22 : " Only those measures are forbidden which international common law does not allow to be taken against foreigners : expropriation for reasons of public utility, judicial liquidation and similar acts are not affected by the Convention. "

And it is with entire reason that M. Politis observes further on that the conclusion to which one is forcibly led is that the measures taken in Roumania with regard to the property of Hungarian nationals have nothing whatever to do with the provisions of Article 250. Certainly Article 232 was not required to give the Roumanian State the incontestable right, like any other State, to proceed to the expropriation, for reasons of public welfare (and economic or social necessities are a paramount factor of public welfare), of the property even of foreigners situated in its territory, and Article 232 has nothing whatever to do with this question. Any State has this right; it is a constituent part of its sovereignty; and it is absurd to suppose that Article 250 could be aimed at or could result in depriving the conquering State, in

(1) We must nevertheless call attention here to a phrase which is not well expressed. It may be expropriated not only as foreign property, but in the same way as any property situated in the territory, irrespective of the owner's nationality.

favour of nationals of the conquered State, of this essential and, one might add, inalienable right. Hence Article 250 cannot have been aimed at and cannot result in anything but the reëstablishment of the ordinary, normal principles of the law, in favour of Hungarian nationals, as against the exceptional war measures, consecrated by Article 232 and its annexes, to the detriment of these nationals.

It is quite true that Article 233 consecrates, in favour of *the Allied and Associated Powers*, more extensive rights. It is no longer a question of freeing them simply from all the effects *of exceptional war measures*, which the conquered belligerents may have enacted against them. It is a question of complete *restitutio in integrum*, whatever the nature of the measures against the nationals of the Allied and Associated Powers, and Hungary undertakes :

a) "To restore and maintain, except as expressly provided in the present Treaty, the property, rights and interests of the nationals of Allied or Associated Powers in the legal position obtaining in respect of the property, rights and interests of nationals of the former Kingdom of Hungary under the laws in force before the war;

b) "Not to subject the property, rights or interests of the nationals of the Allied or Association Powers to any measures in derogation of property rights which are not applied equally to the property, rights and interests of Hungarian nationals, and to pay adequate compensation in the event of the application of these measures. "

This is a very different provision from that enacted in regard to the property of the Hungarian nationals and it is only too easy to understand. It frees the nationals of the Alliedl and Associated Powers not only from the effects of any exceptional war measures which may have been taken against them, as Article 250 does for the Hungarian nationals, as shown above. It goes infinitely further and we believe, with M. Politis, that it consecrates a great innovation in international law, at any rate it has solved a great question, much discussed in theory, as regards expropriation. But it seems to us quite inadmissible to claim that Article 63, paragraph 4, of the Treaty, consecrates the same privilege in favour of the Hungarian national who has exercised the

right of option. What does this provision say? Merely that persons who have exercised their right to opt will be entitled to retain their immovable property in the territory of the other State where they had their place of residence before exercising their right to opt. On what conditions are they to retain this property ? On the ordinary normal conditions. Are they to be exempted from the effects of the expropriation for reasons of public welfare for the past or for the future? Who will maintain that this is meant? This article does not mention expropriation for reasons of public welfare, any more than Articles 232 and 250. Can such expropriation justify claims under international law on the part of the State to which the foreigners belong who consider themselves prejudiced by this measure, and that in respect of the property which it affects? And in what cases? This is a serious question on which opinions may differ but which, in any case, is absolutely outside the scope of the question raised and settled by Articles 232 and 250, and which consequently is outside the competence of the Mixed Arbitral Tribunal.

As to the question of competence, we cannot understand how the Mixed Arbitral Tribunal could settle it in the affirmative. The following is the most striking argument contained in its award : " Whereas it must first of all be pointed out that in inserting Article 250 in the Treaty of Trianon, the intention of the Allied and Associated Powers was fully to protect the property, rights and interests of Hungarian nationals, situated within the territory of the former Austro-Hungarian Monarchy, from all the measures mentioned in Article 232 and the Annex thereto, of Section IV, as well as in Article 250 itself, and to place these properties, rights and interests under the régime of common international law..." Except for the word *place*, for which it would have been better to substitute the word *leave*, it would have been preferable to state what is the truth, namely that Article 250 is not concerned with common international law, that it has neither placed nor left the rights and interests of Hungarian nationals under the régime of common international law, that it was concerned only with freeing these nationals from the consequences of the exceptional war measures authorised by Article 232 and its annexes. Hence the incompetence of the Mixed Arbitral Tribunal to pronounce on common international law follows necessarily, for it is not recognised by Article 250 as competent to pronounce on anything but Article 250 itself. It

is in no way competent to pronounce on common international law. The questions raised by all the claimants before the Tribunal were, however, questions of common international law, and were not in any way connected with those with which Article 250 was concerned. Its incompetence was manifest.

But the tribunal, realising the difficulty, nay the impossibility of deriving its competence in questions of common international law from the text of Article 250, fell back on the preparatory work. Although, therefore, the Counsel of the Roumanian Government do not seem to have taken much notice of this argument, we shall say a word on this subject, since the award of the Mixed Arbitral Tribunal has raised it and made much of it. But we shall first point out that, although preparatory work may be very usefully consulted when it is a question of elucidating an obscure or ambiguous text, it can never prevail against a clear and definite text. Now, that excellent jurist, M. de Lapradelle, who resorted to the argument taken from the preparatory work, was perfectly aware that the text of Article 250 furnished not the slightest argument in favour of the competence of the Mixed Arbitral Tribunal to pronounce on questions which have no connection with those forming the subject of Article 232 and its annex, which are pure questions of common international law. But he advocates a *liberal* reading of the text, *which has nothing small or mean in it*. The competence of the Mixed Arbitral Tribunal to pronounce on the serious questions of expropriation for reasons of public utility, or of public safety (for nothing less is at stake), would, it seems, derive, even before any text, from general legal principles. This is very wide and very vague, and it would be interesting to know what these general legal principles are. All the provisions in question here are provisions of strict and exceptional law, and it would seem truly strange if a State, and a conquering State at that, were to submit amicably to a Mixed Arbitral Tribunal, that is, in reality, to the judgment of a single man and a neutral, the gravest questions of international law affecting its social and economic life and its financial welfare. But, says, M. de Lapradelle, Roumania agreed to do so. This is not exact. Roumania as M. de Lapradelle himself admits, agreed to have recourse to the Mixed Arbitral Tribunal " for the settlement of disputes relating to the restitution to nationals of the former Kingdom of Hungary of their

property, rights or interests situated in ceded territory, *as provided for in Article 250 of the Treaty*. This is clear, as clear as Article 250 of the Treaty, and we cannot understand how, in contradiction to such clear texts, the Mixed Arbitral Tribunal, on the strength of preparatory work, which merely reveals an incidental claim on the part of Hungary, *not recognised by Roumania*, and absolutely refuted by the text, could claim for the Roumanian-Hungarian Mixed Arbitral Tribunal the monstrous right to judge the highest and most vital questions of international law, quite apart from any war, and without the possibility of appeal.

PRACTICAL CONSEQUENCES OF THE AWARD OF THE MIXED ARBITRAL TRIBUNAL

The situation created by the awards of the Tribunal is full of difficulties. This was prophesied by M. Millerand, who refused from the outset to recognise the Mixed Arbitral Tribunal. "Only deference to the Court has brought us here, it being understood that our only task is to set forth the reasons which make it impossible for the Court to declare itself competent and that we shall refuse in any circumstances to plead the substance of the case. Need I add that, having made this statement and having asserted that this suit can only be regarded as fictitious, I reserve most formally, in the name of the Roumanian Government, the right to take, according to circumstances, any decision and to adopt any attitude it thinks right." It is therefore not astonishing that the Roumanian Government immediately communicated to the President of the Roumanian-Hungarian Mixed Arbitral Tribunal that its arbitrator would no longer sit in connection with any of the agrarian matters brought forward by Hungarian nationals. But simultaneously with taking this step the Roumanian Government thought it right to submit to the Council of the League of Nations, in virtue of Article 11, § 2, a request to allow it to acquaint the Council with the reasons on which its action was based. The fact was that the League of Nations *had still before it* a claim brought by the Hungarian Government against the Roumanian Government on March 15th, 1923, under Article 11 of the Covenant. In this claim the Hungarian Government maintained that the Roumanian agrarian reform must not affect the immovable property belonging to the

Hungarian optants, seeing that the Treaties secured to them the *free conservation of this property* and requested the Council of the League of Nations to pronounce on the substance of the question, by deciding that *the legislative and administrative enactments of the Roumanian Government were contrary to the treaties* and ordering the restitution of their property to Hungarian optants.

The Council of the League of Nations was thus in receipt of a formal request by the Hungarian Government. On April 20th, 1923, the Roumanian Government explained its point of view, and on April 23rd, after discussing several draft resolutions submitted for the acceptance of the parties, the Council, which prosecuted this question with tireless activity, postponed the examination of the matter to its July session, at the same time requesting the parties concerned to make every effort to reach an amicable agreement in the meantime. Thereupon M. Adatci, Ambassador, in execution of a mission entrusted to him by the Council, invited the representatives of the two Governments to meet in Brussels on May 25th, 1923, to open, under his auspices, negotiations for an agreement. An agreement was concluded and signed by the representatives plenipotentiary of the two parties on May 29th, 1923. But the Hungarian Government disavowed its representative and persisted in this attitude which was censured by the Council. Whereupon the report of M. Adatci, recording the agreement reached, was approved by the Council, on the advice of Lord Robert Cecil, M. Branting and M. Hanotaux, who expressed their opinion that the special circumstances of the case, the agreement concluded at Brussels and *the impossibility for the Council to fulfil its task if delegates were to be disavowed* " *called for the solution consisting of the acceptance of M. Adatci's report as drafted before this disavowal.*" Now this report recorded the agreement of the two Governments on important points of which the first was that : " the Treaty does not preclude the expropriation of the property of optants (that is, Hungarian subjects for reasons of public welfare, including the social requirements of agrarian reform." The question of the absentees was also settled by mutual agreement. All this must necessarily form the basis of any discussions which might take place later as the result of the request submitted by the Hungarian Government itself to the Council of

the League of Nations. The door remained open for subsequent deliberations. The matter was still before the Council. It was for the Hungarian Government to prosecute its request. It did not do so. After this decision of the Council which bears the date of July 27th, 1923, it did not follow up the procedure thus initiated. But it seems to have had recourse to an ingenious, a too ingenious method of trying to have the differences which separated the two Governments settled by another jurisdiction, and, on December 27th next, several Hungarian nationals came forward to submit to the Mixed Arbitral Tribunal for settlement, on the occasion of a debate on private claims, two serious questions of principle on which the Hungarian and Roumanian Governments were in disagreement, but which *had been settled by a decision of the Council of the League of Nations of July 27th, 1923, in consequence of an agreement between the two Governments.*

The matter has not been taken out of the hands of the Council of the League of Nations. Far from this being the case, the Council has been expressly requested by the Roumanian Government to proceed to the completion of its task. Its competence is certain. But the Hungarian Government asks the Council of the League of Nations to sanction indirectly the award of the Mixed Arbitral Tribunal on the question of competence, by proceeding to appoint two deputy-arbitrators to carry on the work begun by the Tribunal. And that on the basis of this award, which went so far as to ignore the decision rendered in all competence by the Council and to contest the existence of the international agreement *recorded by the Council, after very mature examination.* We cannot admit the possibility of this procedure. We shall certainly not assert that in normal and ordinary cases it is not possible to assimilate the withdrawal by a State of its arbitrator from one series of cases to his withdrawal from all the cases before the Tribunal. We shall merely say that in this *entirely new* and quite exceptional situation, which it was impossible to foresee, the Council of the League of Nations cannot be obliged to condemn and to retract what it has itself decided, and, lending its hand to the prosecution of procedure essentially based on an award which has ignored and contested what the Council of the League of Nations had determined and asserted, acting in its full powers. It is infinitely preferable that

the Council should continue the work of conciliation and appeasement to which it has so liberally and so generously devoted itself, and it is to be hoped that its generous and disinterested efforts will be crowned with success.

Apart from these considerations, it seems to me inadmissible in principle that the Council of the League of Nations, every time that a Government recalls an arbitrator which it has appointed, should have to proceed mechanically to appoint two other arbitrators. Suppose that a Mixed Arbitral Tribunal has still more flagrantly exceeded its powers and encroached on the attributes of another organisation, the Council of the League of Nations, is the latter mechanically to endorse this decision? We cannot admit this. It has another mission, a higher mission : that of mediator and conciliator. This it holds in virtue of Articles 11, 12 and 15 of the Covenant. Still more : it holds it by authority of the parties themselves. It is to the Council and to no other body that this mission was entrusted. We do not believe that there is any organisation better qualified to fulfil it. In questions such as those on which the members of the Council may be called upon to pronounce, there are not only considerations of pure law to be examined. Pure international law is sometimes imperfectly defined. It is being made, it is being added to every day. When in the making, account is taken, it must be admitted, of the considerations of expediency, of the political, economic and even social considerations, on which it must rest. What body is more capable of pronouncing on such matters than the Council of the League of Nations? We do not even believe that it is any use, in cases of this kind, obtaining the opinion of the Permanent Court of International Justice, a purely legal body, which only interprets and explains the generally accepted principles of international law, which in certain circumstances, such as in the *Lotus* affair, can only declare that there are no generally accepted principles, and which cannot, to the same extent as the Council of the League of Nations, take into account the exigencies of the political and the *social life* of the States between which it is called upon to judge.

Is the Council obliged to ask for the opinion of the Supreme Court? No one will maintain this, as it has itself declared. It will act in supreme independence, according to the needs of the hour, as it has done in the past, in the sovereign interests of

word peace. In certain circumtances, it has obtained the opinion of the Permanent Court. In others it has not considered it necessary to do so, as in the Corfu incident, when, in spite of the very delicate legal questions which arose, it confined itself to obtaining the opinion of its Legal Committee. In the present instance it certainly seems urgent for a decision to be taken; and the principal objection to referring to the Supreme Court is the inevitable delay which would result. Now the official representatives of Roumania have not hesitated to point out, with a brutal but necessary frankness, the dangers of the present situation. Centuries of serfdom in Roumania, of subjection to a foreign race, have created this situation. Between Revolution or agrarian reform by expropriation for reasons of public utility there was no medium! Already in 1907, revolution had broken out in Roumania and was suppressed with bloodshed. If the rural section of the population feels that there is even a threat of the supension of this measure, a thing which is in any case out of the question, or of its subordination to charges which would weigh it down and which Roumania could not support, there will be a danger of civil war.

Moreover, in its note to the Peace Conference, of February 19th, 1920, Hungary asked merely that no property belonging to its nationals and existing in the territory of the former Austro-Hungarian Monarchy, should be expropriated in virtue of a measure which, *in the same conditions, would not apply to the subjects of the expropriating State.* In reality, however, their situation is identical, as a result of a series of enactments subjecting the Roumanians to exactly the same measures as the foreigners, and the law of July 30th, 1921, formally consecrated this rule by making no distinction between them. Hungary can no longer object on this score. But beaten on this ground, she has increased her demands. She had asked for equality. She can no longer object on this score either. She has it. But she is asking for privileged treatment so as not even to suffer the consequences of the fall in the exchange since the decree of expropriation, to the exclusion of the Roumanian subjects and the nationals of victorious States who, like the Roumanian State itself, and all its creditors, are bearing the consequences of this fall. Is this admissible?...

In any case, the matter is before the Council. It has been

submitted to it by both Parties. It does not seem possible for it to omit to complete a task entrusted to it by both Parties to the dispute and by the Treaty, and one which it has prosecuted with zeal, which it has in part accomplished and which it will bring to a right conclusion.

ADDITIONAL OBSERVATIONS

Just as we had completed the preceding opinion, a remarkable article was communicated to us, which has just appeared in *L'Europe nouvelle* (pp. 1450 et seq.) and which comes from the pen of our learned colleague and friend. M. Alejandro Alvarez, the founder, with Mr. James Brown Scott, of the American Institute of International Research. In his opinion on the Hungarian-Roumanian dispute given before the Council of the League of Nations, M. Alvarez reached a conclusion identical with our own. But he tackles and settles another question into which we did not go, because we did not consider it indispensable to do so, although our views may be deduced from our observations as a whole. It is the question of the rights of a State over the immovable property situated in its territory and belonging to foreigners. He begins by reporting, more completely than we have done, the conclusions adopted by the *Committee of the Council* of the League of Nations, and afterwards ratified by the Council, conclusions which were approved even by the delegates plenipotentiary of the Hungarian Government. These conclusions may be summed up as follows : 1) that the agrarian reform adopted by Roumanian law and the expropriation which it implies and consecrates apply to Hungarian nationals as to Roumanian subjects; 2) that the Hungarian nationals cannot be treated less favourably than the Roumanian subjects. The first point is incontestable from the point of view of general principles, to which Article 250 of the Treaty of Trianon has not made the slightest derogation. It is indeed concerned only with exceptional war measures, as we have shown, and with exemption from the effects of the latter. To suppose that it could aim at or result in the regulation, for the present or for the future, of the peace régime between Roumania and Hungary, and the conferring on Hungarian nationals of an exorbitant privilege and one unknown in international law would be beyond comprehension. As to the

second proposition, it is a pure concession on the part of Roumania. It is justified from the point of view of equity, but it is imposed by no obligation, and many authors, even the most recent, teach in their works on international law that the *lex rei sitae* must be applied purely and simply.

We therefore think that we can adhere in full to the conclusion of the learned opinion of M. Alvarez, while modifying the terms of it very slightly, and we are of opinion :

1) That the application of the Roumanian agrarian laws to the property of Hungarian nationals in Transylvania in no way comes within the scope of the provisions of Article 250, Article 232 or any other article of the Treaty of Trianon;

2) That the Roumanian Government, by applying the provisions of its agrarian laws to Hungarian subjects as to its own nationals, has violated no principle of international law;

3) That it is, in any case, in no way bound to compensate them to a greater extent than its own nationals;

4) That the Mixed Arbitral Tribunal set up by the Treaty of Trianon, with a strictly limited mission, has no competence to estimate the damage caused to Hungarian nationals by the application of the Roumanian agrarian laws, which hve no relation to the exceptional war measures from which they are freed by Article 250 of the Treaty and to which they were subjected by Article 232;

5) That finally, since what is at stake is much less a legal question, since that has been solved, with the consent moreover of the parties concerned, than one of drawing the practical conclusions from it, it seems superfluous to ask for the opinion of the Permanent Court of International Justice, and it seems expedient that the Council should prosecute to the end, on the basis of general principles and of retroaction, the task to which it has dedicated itself.

We did not think ourselves obliged to make use, in this survey, of the very learned opinions produced by each party in support of its views, in particular those of MM. Dupuis, Pillet and de Lapradelle, in support of the Hungarian claims, especially as they have been reproduced in full in M. de Lapradelle's collection.

We have not even made use of those produced in support of the Roumanian case, although it was not deemed necessary to reproduce them in that collection, not even that of M. Limburg, Counsellor of State, former *bâtonnier de l'Ordre des avocats de La Haye*, and member of the Dutch Delegation to the League of Nations, although we thought it very powerful. When so essential a principle is at stake as that of the right of a State to expropriate the property of foreigners for reasons of public utility, we attach less value to opinions based on concrete cases than to the general theories set forth by the great lights of international law : Let us confine ourselves to mentioning : Von Bar (*Lehrbuch des internationalen Privat und Strafrechts*, p. 96); von Listz (*Das Völkerrecht*); de Louter (*Droit international public*); Fauchille (*Droit international public*, Vol. I, p. 530); Philimore (II,4); Oppenheim (I, p. 320); Calvo (I, p. 359); Weiss, Surville and Arthuys, etc., etc.; and among special works on expropriation : Dupont and Delalleau. We do not think that on the principle itself there can be any divergence of opinion. The property of foreigners is subject to expropriation in the same way as the property of nationals, the property of Hungarians situated in Roumania, like that of Roumanians. Article 232 of the Treaty was not enacted in order to submit them to this common law. Article 250 could not have been intended to free them from it by a really monstrous privilege, when the property of Roumanians and the property of all their Allies in the Great War are subject to it.

Advisory opinion(*)

BY

Dr. Walther SCHUCKING,

Member of the Reichstag,
Professor of Law and Director of the Institute of International Law at the University of Kiel; late Vice-President of the Institute of International Law; Member of the Arbitral Tribunal at The Hague; Member of the Commission of Experts of the League of Nations for the codification of International Law.

The two following questions, which play a special part in the Roumanian-Hungarian dispute still pending before the Council of the League of Nations, have been submitted to the undersigned for his legal opinion :

a) *Can the Council, apprised under Article* 11 *of the Covenant and Article* 239 *of the Treaty of Trianon, refuse to appoint a judge?*

b) *Should the Council refer to the Court at The Hague for an opinion on the recommendations suggested to the Parties?*

PART I.

The facts of the case.

Article 250 of the Treaty of Trianon provides as follows :

"Notwithstanding the provisions of Article 232 and the Annex, to Section IV the property, rights and interests of Hungarian

(*) Translated from the French version.

nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions.

"Such property, rights and interests shall be restored to their owners freed from any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration, taken since November 3, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measures in question.

"Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239.

"The property, rights and interests here referred to do not include property which is the subject of Article 191, Part IX (Financial Clauses).

"Nothing in this Article shall affect the provisions laid down in Part VIII (Reparation) Section I, Annex III as to property of Hungarian nationals in ships and boats. "

On the basis of this Article, a number of Hungarian nationals applied to the Roumanian-Hungarian Arbitral Tribunal in December 1923, alleging that the application of the Roumanian agrarian law to their movable and immovable property was contrary to the provisions of Article 250 of the Treaty of Trianon.

The Roumanian Government, through the intermediary of its official representative on the Roumanian-Hungarian Mixed Arbitral Tribunal submitted a counter-application objecting to the jurisdiction of the Tribunal and declaring that the measures arising out of the agrarian law and concerning the property of Hungarian optants could not be regarded as « retention » or « liquidation » in the sense of Article 250 of the Treaty of Trianon.

The Mixed Arbitral Tribunal, however, by a majority of two votes to one, delared itself competent by a decision taken on January 10th, 1927, and reserved the right itself to determine the matter.

Later (on February 14th, 1927) the Roumanian Government informed the Arbitral Tribunal that it would refrain from discussing the substance of the question and that it would not allow

its arbitrator to sit in connection with any of the requests submitted on agrarian matters (1).

The Council of the League of Nations heard the representatives of Roumania and Hungary at its meeting of March 7th, 1927.

In a detailed report, the representative of the Roumanian Government reviewed the whole question and declared that, in the opinion of his Government, the Arbitral Tribunal in taking its decision of January 10th, 1927, had exceeded the jurisdiction granted to it by the Treaty of Trianon and that, for this reason, the Roumanian Government did not consider itself bound by the said decision.

The Hungarian representative, for his part, proposed that the League of Nations should adopt the following resolution : " The Council of the League of Nations, having heard the statements of the Roumanian and Hungarian delegates, notes that Roumania has decided to withdraw her national arbitrator from the Roumano-Hungarian Mixed Arbitral Tribunal whenever the latter is called upon to decide an agrarian case, and that, in this event, the Tribunal cannot sit — a position, which is inadmissible; appoints, in accordance with its practice and with the provisions of the Treaties, two nationals of States which remained neutral during the war to act as deputy-arbitrators in order that, in default of the national arbitrator of the opposing State, each State may be able to select a substitute ; and proceeds to the agenda." (2)

The Hungarian representative concluded his remarks by stating his Government's point of view once again in the following words : "In my opinion the Council should appoint two neutral deputy-arbitrators, in accordance with its practice as quickly as possible, by which I mean during the present session. There must be no delay of justice." (3).

The Council subsequently decided to have the question examined and appointed as rapporteurs Sir Austen Chamberlain and, at the latter's request, the representatives of Japan and Chili (the " Committee of Three ").

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(1) A more detailed account of what took place before the Mixed Tribunal on January 10th, 1927, seems unnecessary, since these facts are common knowledge and, moreover, since they appear to be of very little importance for the reply which I have to give to the two questions submitted to me.

(2) *Official Journal*, 1927, page 370.

(3) *Official Journal*, 1927, page 370.

Sir Austen Chamberlain submitted the Committee's report at the meeting held on September 17th, 1927.

After reviewing the whole question, the rapporteur set forth the results of the enquiry and draft resolutions, as follows :

" The Committee was therefore obliged to seek a solution by other methods. A minute examination of the question of the Mixed Arbitral Tribunal's juridiction seemed to be of primary importance. It therefore asked the following questions :

" 1. Is the Roumano-Hungarian Mixed Arbitral Tribunal entitled to entertain claims arising out of the application of the Roumanian Agrarian Law to Hungarian optants and nationals?

" 2. If so, to what extent and in what circumstances is it entitled to do so?

" The Committee, after examining these questions and having them examined by eminent legal authorities, arrived at the following conclusions :

" The Mixed Roumano-Hungarian Arbitral Tribunal owes its establishment to the Treaty of Trianon. It is an international tribunal and its jurisdiction is therefore fixed by the terms of the Treaty which created it. It has no jurisdiction beyond that which the agreement of the Contracting Parties has conferred on it. The limits of its jurisdiction are defined by Articles 239 and 250 of the Treaty of Trianon.

" The question at present submitted to the Council for examination relates to the claims addressed under Article 250 to the Mixed Arbitral Tribunal by Hungarian nationals. The provisions of this Article prohibit the retention and liquidation, dealt with in Article 232 and in the Annex to Secton IV of Part X of the Treaty, of the property of Hungarian nationals situated in the territory of the former Austro-Hungarian Monarchy. They also provide for the restitution to their owners of goods freed from any measure of this kind and from any other measure of disposal, of administration or of sequestration, taken in the period which elapsed between the Armistice and the entry into force of the Treaty. They authorise the submission of claims, by claimants who are Hungarian nationals, to the Mixed Roumano-Hungarian Arbitral Tribunal provided for in Article 239.

" If it could be established in any particular case that the property of a Hungarian national suffered retention or liquidation

or any other measure of disposal under the terms of Articles 232 and 250 as a result of the application to the said property of the Roumanian agrarian law and if a claim were submitted with a view to obtaining restitution, it would be within the jurisdiction of the Mixed Arbitral Tribunal to give relief.

" The Mixed Arbitral Tribunal is not competent to give decisions on claims arising out of the application of an agrarian law as such unless the case mentioned in the preceding paragraph arises. In this latter case the jurisdiction of the Mixed Arbitral Tribunal would not be ousted on the ground that the application of an agrarian law was involved.

" Since these considerations show that the claim of a Hungarian national for restitution of property in accordance with Article 250 might come within the jurisdiction of the Mixed Arbitral Tribunal even if the claim arises out of the application of the Roumanian Agrarian Law, we shall proceed to the definition of the principles which the acceptance of the Treaty of Trianon has made obligatory for Roumania and Hungary.

" 1. The provisions of the peace settlement effected after the war of 1914-18 do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.

" Article 250 forbids the application of Article 232 to the property of Hungarian nationals in the transferred territory. Under the terms of Article 250 the prohibition to retain and liquidate cannot restrict Roumania's freedom of action beyond what it would have been if Articles 232 and 250 had not existed. Even if none of these provisions appeared in the Treaty, Roumania would none the less be entitled to enact any agrarian law she might consider suitable for the requirements of her people, subject to the obligations resulting from the rules of international law. There is, however, no rule of international law exempting Hungarian nationals from a general scheme of agrarian reform.

" The question of compensation, whatever its importance from other points of view, does not here come under consideration.

"2. There must be no inequality between Roumanians and Hungarians, either in the terms of the agrarian law or in the way in which it is enforced.

" Any provision in a general scheme of agrarian reform which either expressly or by necessary implication singled out Hungarians for more onerous treatment than that accorded to Roumanians or to the nationals of other States generally, would create a presumption that it was intended to disguise a retention or liquidation of the property of Hungarian nationals *as such* in violation of Article 250 and would entitle the Mixed Arbitral Tribunal to give relief. The same would apply in the case of a discriminatory application of the agrarian law.

" The prohibition against the holding of immovable property of Hungarians in the territories transferred to Roumania even if applied to all foreigners, would not be in accordance with the obligation which Roumania has contracted by the Treaty to permit Hungarian optants to keep their immovable property, but this is a question which does not come within Article 250.

"3. The words "retention and liquidation" mentioned in Article 250, which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territories and in so far as such owner is a Hungarian national.

" The right which the Allied Powers reserved to themselves under Article 232 to retain and liquidate Hungarian property within their territory at the time of the entry into force of the Treaty applies to the property of a Hungarian inasmuch as he is a national of an ex-enemy country. It is not sufficient that these measures entail the retention of Hungarian property by the Government and that the owner of this property is a Hungarian. The measure must be one which would not have been enacted or which would not have been applied as it was, if the owner of the property were not a Hungarian.

" The Committee of the Council therefore ventures to suggest that the Council should make the following recommendations :

a) To request the two Parties to conform to the three principles enumerated above;

b) To request Roumania to reinstate her judge on the Mixed Arbitral Tribunal. "

In opposition to the three principles proposed by the rapporteur and recommended to the two Parties by the Council as a basis of

settlement, the Hungarian representative argued that as the Council was a political authority it was not competent to determine a juridical question (4) and proposed that the Council should obtain the opinion of the Permanent Court of International Justice on the propriety of the three principles.

The Council reserved its decision on this point and proposed that, for the moment, the Parties should not take up a definite attitude regarding the three principles and should not announce their definite decision until their respective Governments had had an opportunity of studying these recommendations in detail.

The proposal made by the President of the Council and adopted by the Council was as follows :

" I proposed that the Council should pronounce on the recommendations contained in this first part of the report. I purposely, however, did not invite the two members of the Council who are parties to the dispute to give their opinion. I invited them not to give a definite reply before December in order that their Governments might have an opportunity of studying with care, and I trust favourably, the report of the Council.

" I am confident that the two parties will agree, will reserve until December their formal opinion on this part of the report, and will inform the Secretary General, in sufficient time before the meeting of the Council of their definite decision in order that the Council may be in a position to consider what are the measures, if any, it may have to take.

" If the parties accept this suggestion, I ask my colleagues to join me in submitting the recommendations contained in the report to the examination of the interested Governments, and in asking them to conform to the principles therein indicated. "

PART II

Question 1. — Can the Council, apprised under Article 11 of the Covenant and Article 239 of the Treaty of Trianon, refuse to appoint a judge?

(4) "Speaking generally, and with all respect for the high moral and political authority of the Council, the latter has no legal power to interpret the Treaty. It has no legal power to compel parties to accept the interpretation which results from its scientific convictions."
(*Official Journal*, 1927, meeting of September 17th, 1927).

The reply to this question depends upon an interpretation in accordance with the meaning of Article 239 of the Treaty of Trianon.

Article 239 of that Treaty provides *inter alia* :

" Within three months from the coming into force of the present Treaty, a Mixed Arbitral Tribunal shall be established between each of the Allied and Associated Powers on the one hand and Hungary on the other hand. Each such Tribunal shall consist of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments concerned. In case of failure to reach agreement, the President of the Tribunal and two other persons, either of whom may in case of need take his place, shall be chosen by the Council of the League of Nations, or, until this is set up, by M. Gustave Ador if he is willing. These persons shall be nationals of Powers that have remained neutral during the war.

" If in case there is a vacancy a Government does not proceed within a period of one month to appoint as provided above a member of the Tribunal, such member shall be chosen by the other Government from the two persons mentioned above other than the President. "

Paragraph 1 of the Annex to Article 239 of the same Treaty provides as follows :

" Should one of the members of the Tribunal either die, retire or be unable for any reason whatever to discharge his functions, the same procedure will be followed for filling the vacancy as was followed for appointing him. "

An interpretation in accordance with the meaning of Article 239 of the Treaty of Trianon concerning the question here being examined : the appointment of deputy judges by the Council of the League of Nations, must be based on the following considerations :

The first three paragraphs of Article 239 and paragraph 1 of the Annex to that Article lay down the principles to be observed for the constitution and particularly the choice of members for the Mixed Arbitral Tribunal. In regard to the question under consideration here, it is expressly provided that if, in case of a vacancy, a Government does not proceed within a period of one month to the appointment of a new national arbitrator, such

arbitrator shall be chosen by the other Government from two persons whom it is the Council's duty to propose.

The *ratio* of that clause is obviously as follows :

The fact that, if a vacancy on the Tribunal occurs in the circumstances provided, the parties have the right themselves to choose the new arbitrator from two persons proposed by the Council, shows that the authors of the Treaty wished to prevent the activities of the Arbitral Tribunal from being *arbitrarily* hampered by the *unjustified* action of one of the parties and the execution of the provisions of the Peace Treaty from being rendered impossible by the adoption of *arbitrary* methods.

A vacancy on the Tribunal may arise in various ways. Paragraph 1 of the Annex to Article 239 expressly refers to vacancies due to the death or resignation of an arbitrator, or, as expressly stated, to the fact that one of the members of the Tribunal is " unable to discharge his functions ".

According to a considered interpretation of Article 239, in all these cases the State to which the retiring judge belongs should — by the fact that the other party is granted the special right to appoint a judge — be precluded from the possibility of preventing the normal functioning of the Arbitral Tribunal by an arbitrary refusal to appoint its national arbitrator and of thereby defeating the ends of the Treaty of Trianon.

The object aimed at by the contracting Parties when they created the Mixed Arbitral Tribunals was, in particular, the definitive settlement by arbitration of certain disputes specially mentioned in the Treaty — an object which could not be attained unless the contracting parties previously laid down formal and material conditions which would enable the Arbitral Tribunal to function without hindrance in a normal manner.

In view of the fact that the *arbitrary* disorganisation of the Tribunal's activities by one or other of the parties was a very possible eventuality, paragraph 3 of Article 239 provides by way of sanction against the party guilty of such action that if a vacancy occurs on the Tribunal, the Government directly concerned is obliged to appoint a new judge within a period of one month; failing such appointment the other party is authorised to choose the deputy arbitrator from the two persons nominated by the Council.

According to these considerations, the right of one party to

appoint also, in certain circumstances, the judge of the other party *can be explained only by the intention to give further protection against any arbitrary or unjustified action by that other party.*

From the foregoing remarks it will also be seen that this further protection exists only if the other party adopts an unjustified attitude. If no such attitude is adopted by the opposite party, there can be no question of the protection of a right, since the protection applies solely to unjustified actions by the opposite party and not to justified actions.

In other words, to take a concrete case : If the vacancy on the Tribunal is caused by one of the parties in a justified manner, the other party is not entitled to ask that a new judge be appointed.

It is obvious that there may be cases in which it is considered that a vacancy has been caused in an unjustified manner; such, for example, would be the case if a national arbitrator were repeatedly insulted or ill-treated by the President of the Arbitral Tribunal or by the representative of the opposite party; or again, if the national judge of the other party were threatened with punishment if he failed to vote in a certain sense.

If, in such an event, a State withdrew its arbitrator, it would be justified in doing so and it would be most absurd to assert that the opposite party would then have the right to appoint another arbitrator to replace the one recalled.

The general rules regarding the interpretation of international Treaties also prove that Article 239 of the Treaty of Trianon can be interpreted only in the way I have indicated. It is generally recognised that all international treaties are *bona fide* agreements. Any clause of a treaty must be interpreted in good faith. Referring to the interpretation of international treaties, M. Pradier-Fodéré writes as follows in his *Traité de droit international public européen et américain*, — 1885, Vol. II, page 885 :

" Since in interpreting given words, it is a question of attributing to them the meaning which should be presumed as being the most in accordance with the intention of the persons who used them, and since it cannot be presumed that any person would require the performance of an act which is not only physically impossible but also morally inadmissible, that is to say, so contrary to reason, that it cannot be associated with a

person in possession of all his faculties, it follows that any interpretation leading to a physical impossibility or to an absurdity should be rejected. "

No reasonable person would claim that, if the national representative of one of the parties has, by means of threats succeeded in bringing about the resignation of the national representative of the other party, and if the latter refuses to appoint a new judge, the opposite party would have the right to proceed to the appointment of that judge.

It would be acting contrary to the fundamental principles of good faith if a State, whose judge has, by means of threats, forced the judge of the other party to resign, was further permitted to aggravate in a factitious manner the position of the other party by appointing a national of another State, chosen in accordance with the terms of Article 239, to replace the national judge who resigned.

It goes without saying that, by reason of his acquaintance with his own national law, a national judge is more qualified than any other person — within the limits of the judicial field, of course — to safeguard the interests of his fellow-countrymen.

The first conclusion reached from the foregoing observations is that Article 239 of the Treaty of Trianon interpreted according to the spirit of that article should be construed as follows :

It is *only* in case one of the parties causes, in an *unjustified manner*, a vacancy to occur on the Tribunal that the other party shall have the right to ask for the appointment of a new judge.

Or, to state this in positive terms :

If a vacancy has been caused *in an unjustified manner*, the right of the other party to fill that vacancy by the appointment of a new judge does not exist.

But what are the cases in which a vacancy can be considered as having been caused in a justified manner?

We have already mentioned a certain number of such cases. The principle to be observed is that each specific case should be examined with a view to determining whether the withdrawal of a judge constitutes justified or arbitrary action.

In the Roumanian-Hungarian dispute regarding the exceeding of powers by the Roumanian-Hungarian Arbitral Tribunal following its decision of January 10th, 1927, the question arises whether an exceeding of powers by the Arbitral Tribunal (and

this point is still doubtful) entitled the Roumanian Government to withdraw its judge from that body, with the judicial consequence that, in that event, the Hungarian Government has no right to have a new judge appointed.

In order to settle that question we must first of all refer to the following general considerations relating to the legal force of decisions taken by Arbitral Tribunals.

Pursuant to the idea that the object of an arbitral award is definitely to settle a dispute, both State doctrine and practice unanimously agree that an arbitral award GIVEN IN A LEGAL MANNER has the effect of *res judicata*. This rule might be accepted as an incontestable international principle.

Lammasch writes as follow : " *Provided that the Arbitral Tribunal has not exceeded its jurisdiction*, an arbitral award has the effect of *res judicata* exactly as in the case of a judicial decision. " (Rechtskraft, p. 91.)

In 1877, the Institute of International Law examined the question of the legal value of awards given by international courts of arbitration and took the following resolution :

"The award *duly given* settles, within the limits of its effect, the dispute between the parties. " (Article 25 : Annual, I, p. 133.)

The text of Articles 54 and 81 of the peace protocols of 1899 and 1907 is almost identical with the above :

" The award, *duly given* and notified to the representatives of the parties, *definitely* settles the dispute without appeal. "

Although it is an indisputable fact that, in its effect, any arbitral award given in due and proper form can be regarded as equivalent to a definitive decision, that is to say it can be regarded as having legal force both from the formal and material point of view, a thorough and detailed examination of State doctrine and practice shows that specific flaws in procedure, of a formal or material nature, neutralise that effect. If we examine the nature of these flaws and the influence they may have on the judicial value of an arbitral award, we are forced to conclude that there exists a considerable amount of confusion in the literature on international law. A study of the theory and practice adopted in State matters establishes one point on which there can be no doubt, namely : the existence of special circumstances in arbitral proceedings renders the arbitral award

void. It is true, however, that opinions differ on the reasons for which an award becomes void.

Bulmerincq enumerates the ten following reasons :

1) Invalidity of the terms of submission ; 2) Flaw in the terms of submission ; 3) Absolute illegality ; 4) Inaccuracy of fact or error due to the parties or to the arbitrator ; 5) Insufficient hearing of the parties ; 6) Partiality on the part of the judge; 7) Disingenuous treatment of one of the parties by the judge or dishonesty on the part of the latter; 8) Imposing of improper obligations ; 9) Disingenuousness on the part of one of the parties in regard to the other party.

The Institute of International Law reduced the number of reasons for which the execution of an arbitral award can be refused on the ground of nullity to four, viz :

a) Invalidity of the terms of submission;

b) Exceeding of powers;

c) Corruption proved against on of the arbitrators;

d) Essential error. (*Annuaire* I, p. 132.)

This question also played an important part in the Hague Conferences.

The Russian proposal of 1899, although recognising in principle that an arbitral award should be final, provided in Article 26 that the award should be considered void in the following cases :

a) Exceeding of competence;

b) Corruption proved against the judge;

c) Nullity of the terms of submission.

In the course of the discussions, attention was called to the irregular situation that would arise if, in regard to the proceedings of the International Arbitral Tribunals, a court of the second instance had authority to pronounce on the legal value of an award.

It was perhaps on account of this irregularity that Article 26 of the Russian proposals was deleted (cf. Lammasch, Rechtskraft, p. 148 and ff.; and for greater detail : International Peace Conference, Vol. IV, page 149).

However difficult it may be to determine the flaws of procedure which may nullify an arbitral award, it will suffice, in the present case, to state that the fact that there has been an exceeding of competence, " *insoweit diese reicht* ", undeniably has the effect of rendering the award null and void.

There can scarcely be any doubt on that point.

It is a recognised principle that an arbitrator acts in that capacity only in so far as he does not exceed the limits laid down for him in the terms of submission; this principle finds its expression in the axiom " extra comprissum *arbiter nihil facere potest* ".

Nothing undertaken by the arbitrator beyond the limits of the sphere of competence defined by the terms of submission to arbitration signed by the parties can be regarded as the act of an arbitral judge nor can it, in consequence, have the effect of *res judicata*.

Writers on international law are surprisingly unanimous on that point.

Mallasch, for example, writes as follows : " Finally, in regard to an application that a certain decision be declared void, only two of the grounds already admitted by the Institute of Law can be taken into consideration : corruption and the *exceeding of the terms of submission* ". (Schiedsgerichtsbarkeit, p. 221), and, further :

" If the award is given by an arbitral tribunal outside the Permanent Court (reference is here made to the Arbitral Tribunal at The Hague), considering the possibility of there being an appreciable difference in the character of such Tribunals, any decision going beyond the terms of submission might be regarded as sufficient grounds for declaring the award null and void. " (Op. cit. 223; cf. also Lammasch Rechtskraft, p. 167-169.)

Weiss deals with this point very clearly (R. D. J., 1910, p. 122) :

" And *when it appears* to one of the parties that the decision given against it is the result of an exceeding of powers or is due even to the corruption or bad faith of the arbitrator, it shall be the right and strict duty of that party to refuse to execute the decision; and, as required by international custom, it shall acquaint the other party of the reasons for which it considers the decision null and void. "

See also, in this connection, the opinions expressed by Meurer, *Das Friedensrecht der Haager Konferenz*, I, p. 348, and Zorn, quoted by Lammasch, Rechtskraft, p. 162 (5).

If from the foregoing, we reach the inevitable conclusion that the fact that the Roumanian-Hungarian Tribunal possibly exceeded its powers renders the decision of January 10th, 1927, null and void, the reply to the question asked above with a view to determining whether in a definite case of exceeding of powers the Roumanian Government is justified in withdrawing her national judge from the Arbitral Tribunal should undoubtedly be in the affirmative, for the following reasons :

The Mixed Arbitral Tribunal was created for the purpose of ensuring the execution of certain clauses of the Treaty of Trianon.

So long as the Arbitral Tribunal remains within the limits laid down by the Treaty of Trianon it is legally exercising its authority within a sphere of activity allotted to it by the contracting parties (Allied and Associated Powers of the one part and Hungary of the other part). In these conditions, the Arbitral Tribunal is merely carrying out the wishes of the contracting parties.

If, however, the Arbitral Tribunal exceeds its competence, it leaves the sphere of the Treaty of Trianon and its actions should be regarded as actions that were not required by the parties. They are therefore irrelevant so far as the parties are concerned and cannot lead to legal consequences binding on those parties.

Consequently, if there has really been an exceeding of powers — a point which we are *not* called upon to examine here — the Roumanian Government was justified in withdrawing its national judge from the Roumanian-Hungarian Mixed Arbitral Tribunal, for no Treaty obliges Roumania to instruct her national judge

(5) Certain authorities go so far as to declare that even an award of the Permanent Court of International Justice shall be considered to be null and void in the possible case of exceeding of competence (*soweit diese nicht reicht*). See for example the opinion expressed by Vezijls : "This case raises the general question of the consequences that might ensue for the parties in dispute if the Tribunal has obviously exceeded its jurisdiction. Notwithstanding the terms of Articles 60 and 61 of the Statutes, there is no doubt that in such a case at least the relevant part of the award could not be legally binding on the parties. Since for the purposes of international justice any application based on the ground so frequently cited in former arbitral procedure, namely "essential error", as an alleged reason for declaring an arbitral award null and void, should incontestably be excluded, it surely cannot be accepted in the case of an exceeding of competence on the part of the Tribunal". (*Zeitschrift für Völkerrecht*, 1926, p. 521).

to take part in juridical discussions (pronouncement of awards contrary to competence) for which the Treaty of Trianon constitutes no basis in law.

Any reasonable interpretation of the provisions of Article 239 of the Treaty of Trianon, which in certain circumstances entitles one of the parties to appoint also the judge representing the other party, can only lead to the conclusion that this sanction is to guarantee the execution of the Treaty through the normal working of the Arbitral Tribunals against any arbitrary *sabotage* on the part of one or other of the parties.

Any judicial act by the Roumanian-Hungarian Mixed Arbitral Tribunal which did not fall within the limits laid down by the Treaty of Trianon (here, in particular, the pronouncement of decisions outside its competence) would no longer be an act in execution of that Treaty and neither of the contracting parties could avail itself of the right provided by Article 239, namely : to appoint a new judge, without acting in a manner contrary to its own intention manifested at the time of the signing of the Treaty.

The considerations set forth above lead to the following conclusion :

If, by its decision of January 10th, 1927, the Roumanian-Hungarian Mixed Arbitral Tribunal has really exceeded the limits of competence assigned to it by the Peace Treaty of Trianon, the withdrawal of the Roumanian judge from the discussion of the agrarian reform in question was justified and Hungary, on a reasonable interpretation of Article 239 of the Treaty of Trianon, would in no way be entitled to appoint a new judge to replace the one who has been withdrawn.

In the Roumanian-Hungarian dispute, however, the situation *de facto* is more complicated owing to the fact that Article 239 of the Treaty of Trianon expressly provides that, although the right to appoint a judge belongs to the parties, this judge must be chosen from two persons nominated by the Council of the League of Nations.

The question here arises of the duty which, from the juridical point of view, devolves upon the Council of the League of Nations in regard to the appointment of a judge to fill a vacancy on the Tribunal.

In examining this point, we must start with the following general considerations :

Article 239 of the Treaty of Trianon prescribes that these " two other persons "... *shall be chosen* by the Council of the League of Nations.

The following question now arises : Is the League of Nations bound by the provisions of Article 239 of the Treaty of Trianon?

The text of Article 239 alone, if no account be taken of the fact that the Treaty of Trianon constitutes, conjointly with the Covenant of the League of Nations, one single Treaty, permits of no conclusion as to the manner in which the Council of the League is to proceed. Taking into account, however, the fact that the Treaty of Trianon and the Covenant of the League of Nations forms one document, and that technically it is one single instrument, it undoubtedly follows that in virtue of Article 239 of the Treaty of Trianon, certain duties devolve upon the Council of the League of Nations, duties, which, in principle, it is bound to fulfil.

This view of the question is supported by the procedure followed by the Council of the League of Nations :

Thus, on March 11th, 1927, the Council of the League appointed a new President in place of the retiring President of the German-Polish Arbitral Tribunal. Further, when the German Government withdrew its representative from the Franco-German Mixed Arbitral Tribunal at the time of the occupation of the Ruhr, the Council nominated two qualified persons to act as deputy judges, in execution of the provisions of Article 304 of the Peace Treaty of Versailles.

If under Article 239 the Council of the League of Nations has thus, in principle, the duty of appointing two judges in the conditions laid down in that article, the choice should be made in good faith and in *tempus utile*.

Given the foregoing considerations and taking into account the considerations of a juridical and general nature, a reply can now be supplied to the following question :

In view of the fact that the Roumanian Government has refused to recognise the arbitral decision of January 10th, 1927, on the ground of an exceeding of powers, should the Council of the League of Nations accept the Hungarian proposal that the

deputy judges be appointed in execution of the provisions of Article 239 of the Treaty of Trianon?

In order to reply to that question, it must be considered from the point of view :

1) That an arbitral award given as a result of an exceeding of powers is a voidable act;

2) That, in case of an exceeding of powers, each party has the right to withdraw its judge in order to prevent further judgments from being pronounced in this matter;

3) That the obligation imposed by Article 239 of the Treaty of Trianon regarding the appointment of a new judge to replace the judge who has been withdrawn, does not exist in the case of an exceeding of powers;

4) That, in virtue of Article 239 of the Treaty of Trianon, the Council of the League of Nations has the right to collaborate in the filling of a vacancy on the Tribunal;

5) That the Council of the League of Nations cannot, in principle and in general, refuse to cooperate in the appointment of a deputy judge;

6) *That so long as there remains any doubt, however, as to the question whether the Roumanian-Hungarian Arbitral Tribunal has not, by its decision of January 10th, 1927, exceeded the jurisdiction assigned to it by the Treaty of Trianon, the Council of the League of Nations should refrain from appointing deputy judges;*

By acting contrary to this rule, any action taken with a view to filling the vacancy on the Tribunal would be an injustice to Roumania:

7) That the Council of the League of Nations *cannot* proceed to the appointment of judges unless it has assured itself that it is in no way exceeding its powers (it must in any case examine the question).

For these reasons, the question asked at the beginning of this chapter, viz :

" Can the Council, apprised under Article 11 of the Covenant and Article 239 of the Treaty of Trianon, refuse to appoint a judge? "

Calls for the following answer :

" So long as the Council of the League of Nations has any doubt regarding the question whether the Roumanian-Hungarian Arbitral Tribunal has not, by its decision of January 10th, 1927, exceeded the powers assigned to it by the Treaty of Trianon, it should refrain from appointing deputy judges. "

PART III

Question 2. — Should the Council refer to The Hague Court for an advisory opinion on the recommendations which it has suggested to the parties?

Before attempting to reply to this question, the facts of the case must once more be recalled. It has already been stated in Part I that at its meeting of March 7th, 1927, the Council appointed a Committee of Three to examine the Roumanian-Hungarian dispute and to report on the question. As shown in the minutes of the meetings held by the Council of the League of Nations, both the Roumanian and Hungarian representatives gave their consent to this solution. (6)

This decision on the part of the Council to appoint a Committee of enquiry must be considered as perfectly regular.

With a view to settling a dispute by arbitration, the Committee of Three lays down three principles which it deduces from an interpretation of the Treaty of Trianon and these principles were submitted by the Council of the League of Nations to the parties for approval. The Hungarian representative proposed that the Council should ask the Court of International Justice for a report on the question whether these principles were really a consequence of the Treaty of Trianon.

Is the Council obliged to ask for such a report?

(6) M. Titulesco, the Roumanian representative said : "First of all I must thank Sir Austen Chamberlain for kindly consenting to report on this question, and I should be very grateful to the Chilian and Japanese representatives if they would serve on the Committee of Enquiry to draw up the report to the Council."

M. Cajzago, the Hungarian representative made the following statement : "I also am happy to hear that Sir Austen Chamberlain accepts, and should be glad if the Japanese and Chilian representative would agree to the President's proposal. I should like to thank them in advance for all the trouble they will have to take in order to help in settling this question."

The answer to this question must first of all be sought in the Covenant. The Covenant refers only to an opinion of the Permanent Court of International Justice and states that the said Court shall give an opinion on the questions submitted to it by the Council or by the Assembly. There is no clause to the effect that the Council or the Assembly of the League of Nations is *under the obligation* to ask the Permanent Court of International Justice for such an opinion.

It is, however, possible that a common law document might acquire that interpretation through custom. But even that is not the case here. The practice of the League of Nations permits of the contrary conclusion.

It will be remembered that in connection with the Corfu incident, certain members of the Council had expressed the wish that the Permanent Court of International Justice be asked to give an opinion. In particular, M. Branting, the Swedish representative did his utmost to induce the Council to ask for that opinion, but he failed to convince all his colleagues and the questions of law which had arisen were therefore submitted to a committee of jurists for examination.

There is a further example : In 1923, the Lithuanian Government requested the Council of the League of Nations to obtain an opinion by the Permanent Court of International Justice on the attitude adopted by the Council in the Vilna affair. The Council did not grand Lithuania's request.

The second question which is submitted to me is as follows :

Should the Council refer to The Hague Court for an opinion on the principles which it has recommended to the parties ?

Considering :

1) That there is nothing in the statutes which oblige the Council to ask for an opinion by the Permanent Court of International Justice; and

2) That a legal principle established through custom cannot be proved,

the above question should be answered as follows :

> The Council of the League of Nations is under no obligation to ask the Permanent Court of International Justice for an opinion on the principles submitted to the parties for their approval.

In view of the fact that the juridical obligation to solicit, at the request of one the parties, the opinion of the Permanent Court of International Justice does not exist, the question whether it is proper for the Council of the League of Nations to ask the Permanent Court of International Justice for an opinion on the material accuracy of the recommendations which it has made to the parties is rather a question falling within its own competence. A reply to that question of competence is not within the purview of the present report.

Kiel, November 26, 1927.

A new aspect of the Roumanian-Hungarian dispute[1]

The affair of the optants before the Council of the League of Nations

(September 17th-19th 1927)

BY

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On August 16th 1922, the Hungarian Government brought to the attention of the Conference of Ambassadors the expropriation by the Roumanian Government under the agrarian reform of immovable properties belonging in the territories transferred by the Treaty of Trianon to the Kingdom of Roumania to persons who, while being natives of those territories, had opted for Hungarian nationality under the terms of Articles 63 and 64 of the above-mentioned Treaty and Article 3 of the Roumanian-Hungarian Minorities Treaty.

"On August 31st, 1922, the Conference of Ambassadors informed the Hungarian Government that its claims related entirely to the stipulations of the treaty between Roumania and the Principal Allied and Associated Powers concerning minorities and should, under that treaty, be addressed to the League of Nations. On a further request by the Hungarian Government the Conference of Ambassadors, in a letter dated February 27th 1923, informed Hungary that she, or another member of the League shoud take the initiative in bringing the matter before the Council" (2).

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(1) Article published in the *Revue générale de Droit International public*, N° 5, 1927. Translated from the French version.

(2) This statement of facts is taken from the report by Sir Austen Chamberlain, rapporteur of the Committee of Three, at the Session of the Council from September 17th to 19th 1927.

Hungary therefore applied to the Council and requested it to give a ruling on the substance of the question ; to declare that the Roumanian legislative and administrative provisions of the agrarian reform were contrary to the Treaties; to ensure, as regards the future, that Roumania should act in conformity with the provisions of the Treaty; to order that the immovable property of Hungarian optants should be restored to them and that it should in future be free from all charges contrary to the provisions of the Treaties and, finally, that full compensation for damage should be given to the injured parties.

The Council considered this question in April and July 1923.

On July 5th 1923, the Brussels negotiations opened in May between the Hungarian and Roumanian representatives upon the recommendation of the Council were the subject of protracted discussions. The Roumanian delegate appealed to the Brussels "Agreements", and the Hungarian delegate stated that no agreement had been reached.

With the exception of the Hungarian delegate, who abstained from voting and declared that in his opinion the question remained unchanged, all the Members of the Council took a resolution requesting the two Governments to "do their utmost to prevent the question of the Hungarian optants from becoming a disturbing influence in the relations between the neighbouring two countries (3)". The Council was convinced that the Hungarian Government "would do its best to reassure its nationals", and that "the Roumanian Government would remain faithful to the Treaty and to the principles of justice upon which it declared that its agrarian legislation was founded, by showing proof of its good will in regard to the interests of the Hungarian optants."

Such was the position when, from December 1923 onwards, a number of applications from Hungarian nationals or optants owning lands in the territories transferred to Roumania were submitted to the Secretariat of the Roumanian-Hungarian Mixed Arbitral Tribunal provided for in Article 239 of the Treaty of Trianon asking, among other matters, that the Tribunal should declare that the measures restricting their right of ownership, which had been applied to their movable and immovable property

(3) Minutes of the 25th Session of the Council. *Official Journal of the League Nations*. August 1923, p. 886 et seq., and Annexes 533 and 533 *a* (ibid., pp. 1009 et seq.).

by the Roumanian State, were contrary to the provisions of Article 250 of the Treaty of Trianon, and that it should order the Roumanian State to make restitution.

In 1925, the Roumanian Government submitted exceptional applications implying the incompetence of the Tribunal. Without accepting the second method which, finally, was pleaded solely by the Government, to wit, that the measures taken in particular against the property of Hungarian optants could not be regarded as measures of retention or liquidation within the meaning of Article 250 of the Treaty of Trianon and, consequently, that they were outside the competence of the Tribunal, the latter, on January 10th, 1927, declared itself competent under Article 250, paragraph 3 of the Treaty of Trianon and called upon the defendant (Roumania) to forward her reply within a period of two months.

«On February 24th, 1927, Roumania informed the Tribunal that she would refrain from submitting her reply regarding the substance of the question and that, consequently, her arbitrator would no longer sit in connection with any of the agrarian matters brought forward by Hungarian nationals. At the same time, she submitted to the Council, in virtue of Article 11, paragraph 2 of the Covenant, a request to allow her to acquaint the Council with the reasons on which her attitude was based."

On March 7th, 1927, the Council of the League af Nations heard the statement of M. Titulesco, the Roumanian representative (4). Replying to that statement, the Hungarian representative asked the Council to appoint, "in accordance with its custom and the provisions of the Treaty, two deputy members, nationals of States which had remained neutral during the war so that each State might, if necessary, be able to choose a substitute for the arbirator withdrawn by the other State (5).

It was then that the Council requested the British representative to report on this question at its next Session. The representative of Chili and the representative of Japan were requested to assist Sir Austen Chamberlain in the preparation of his report. Thus, the Committee, known as "the Committee

(4) *Official Journal of the League of Nations*, April 1927, pp. 350 et seq.
(5) *La Réforme agraire en Roumanie et les Optants hongrois de Transylvanie devant la S. D. N. Bucarest*, State Printing Works 1927, p. 71, and Official Journal of the League of Nations, April 1927, p. 370.

of Three" was formed, which during the June 1927 Session of the Council kept "in close touch with the representatives of the two Governments."

Deeming it impossible "to take a purely and strictly legal view of the Council's duties, especially as it realised that the election of the two deputy members would not have finally ended the difference (6); the Committee attempted to bring about a general settlement which would have "terminated the controversy and led to better feelings."

Neither of the two parties, however, was of opinion that they could accept the "conciliatory formulas proposed by the Council."

After a last attempt at conciliation, on September 2nd, 1927, "being obliged to seek a solution by other methods", the Committee of Three proceeded to a minute examination of the question of the Mixed Arbitral Tribunal's jurisdiction. In order better to examine this problem, the Committee took the opinion of eminent legal authorities (7). The examination made in these conditions, in so far as the substance of the question is concerned, led it to lay down the three following principles:

"1. — The provisions of the peace settlement effected after the war of 1914-1918 do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.

"2. — There must be no inequality between Roumanians and Hungarians, either in the terms of the Agrarian Law or in the way in which it is enforced.

"3. — The words "retention" and "liquidation" mentioned in Article 250, which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territories and in so far as such owner is a Hungarian national."

Developing and at the same time defining its opinion, the Committee commented on the declaration of principle 3 as follows :

"The right which the Allied Powers reserved to themselves

(6) Sir AUSTEN CHAMBERLAIN'S Report, 47th Session of the Council. Meeting of September 17th 1927, at 10 a. m. Doc. C. 47th Session, Minutes I (1), p. 4.
(7) CHAMBERLAIN Report, *Ibid.*, p. 5.

under Article 232 to retain and liquidate Hungarian property within their territory at the time of the entry into force of the Treaty applies to the property of a Hungarian inasmuch as he is a national of an ex-enemy country. It is not sufficient that these measures entail the retention of Hungarian property by the Government and that the owner of this property is a Hungarian. The measure must be one which would not have been enacted or which would not have been applied as it was if the owner of the property were not a Hungarian."

Principle 2 was supplemented as follows :

"Any provision in a general scheme of agrarian reform which either expressly or by necessary implication singled out Hungarians for more onerous treatment than that accorded to Roumanians, or to the nationals of other States generally, would create a presumption that it was intended to disguise a retention or liquidation of the property of Hungarian nationals *as such* in violation of Article 250 and would entitle the Mixed Arbitral Tribunal to give relief. The same would apply in the case of a discriminatory application of the Agrarian Law."

These principles being laid down, the Committee suggested that the Council : *a*) request the two parties to conform to them; *b*) request Roumania to reinstate her judge on the Mixed Arbitral Tribunal.

How did the Council reply to the Committee's suggestions?

1) The Council did not request Roumania to reinstate her judge; it did not appoint the two deputy arbitrators demanded by Hungary (8);

2) It considered that in virtue of Article 11, paragraph 2 of the Covenant and notwithstanding the Roumanian-Hungarian Mixed Arbitral Tribunal's decision of January 10th, 1927, it could request the two parties to conform to the three principles formulated in the report (9).

(8) 47th Session of the Council. Fourth public Meeting, Sept. 19th 1927 at 3 p. m. *Doc. c.* (47th Session) Minutes 4 (1) p. 4 et seq.

(9) It made a proposal to the parties whereby they retain full liberty of action (Declaration by M. Urrutia, Minutes 4, p. 4). Exercising this liberty, Hungary refused to accept the three principles of the report. Roumania, on the contrary, declared that she was prepared to accept the report if Hungary also accepted it.

The Council requested the two parties, in order to allow time for reflection, not to give their final answer to the proposal until December 1927.

3) The Council pronounced its decision without applying to the Permanent Court of International Justice for an advisory opinion. All decision was postponed until December 1927 on the question as to whether it were necessary to ask the Court for an opinion, as proposed by the President.

The above facts raise, *inter alia*, the following points which are the only ones which will be examined here.

⁂

1) Under the terms of Article 239 of the Treaty of Trianon :

> "*a*) Within three months from the coming into force of the present Treaty, a Mixed Arbitral Tribunal shall be established between each of the Allied and Associated Powers on the one hand and Hungary on the other hand. Each such Tribunal shall consist of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments concerned.
>
> "In case of failure to reach agreement, the President of the Tribunal and two other persons, either of whom may in case of need take his place, shall be chosen by the Council of the League of Nations, or, until this is set up, by M. Gustave Ador if he is willing. These persons shall he nationals of Powers that have remained neutral during the war.
>
> "If in case there is a vacancy a Government does not proceed within a period of one month to appoint as provided above a member of the Tribunal, such member shall be chosen by the other Government from the two persons mentioned above other than the President.

2) § 1 of the Annex to Section VI, Part X of the Treaty of Trianon lays down that :

> "Should one of the members of the Tribunal either die, retire, or be unable for any reason whatever to discharge his functions the same procedure will be followed for filling the vacancy as was followed for appointing him."

3) According to Article 250 of the Treaty of Trianon :

"Notwithstanding the provisions of Article 232 and the Annex to Section IV the property, rights and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions.

"Such property, rights and interests shall be restored to their owners freed from any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration, taken since November 3, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measures in question.

"Claims made by, Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239."

4) Article 11 of the Covenant of the League of Nations says :

"Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council.

"It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends."

5) Under Article 14 of the Covenant of the League of Nations :

"The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an

international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

Three consequences result from these texts and general principles of international law :

1) The Council of the League of Nations was not called upon to appoint and could not appoint deputy judges to fill the vacancy on the Roumanian-Hungarian Mixed Arbitral Tribunal caused by the withdrawal of the Roumanian arbitrator;

2) Relying upon Article 11, paragraph 2 of the Covenant, the Council could have validly complied with the Roumanian request, notwithstanding the Mixed Arbitral Tribunal's decision of January 10th 1927;

3) It could have done this without recourse to the Court for an advisory opinion : far from being obliged, in the circumstances of the affair, to have recourse to such an opinion, it would not and could not have been able to apply for it without disregarding the juridical regime governing applications for opinions.

First Point.

The Council of the League of Nations was not obliged to appoint and could not appoint judges in order to fill the vacancy on the Roumanian-Hungarian Mixed Arbitral Tribunal caused by the withdrawal of the Roumanian arbitrator and to allow that organisation to continue its work.

Assuming (for the moment and contrary to the following explanation) that the Council had the power, in the circumstances of the affair, to appoint the judges, was it obliged to do so? Was its competence restricted? The reply must be in the negative, for the following reasons, which refer : 1) to the nature of the Council ; 2) to the overpowering necessity for it to conciliate the special powers (in the present case, collaboration in the execution of the treaties) conferred upon it by the treaties with the powers which it holds under the Covenant of the League of Nations; 3) to the text of the decision of January 10th 1927.

Before examining each of these reasons, we will briefly note that the form in which the treaty is expressed (Article 239) must not here be taken into account. It would in truth be very presumptuous to conclude that the competence of the Council is limited because the English text uses the imperative "shall" whereas the less categorical French text uses the simple future ("Le Président sera choisi à la suite d'un accord... Au cas où cet accord ne pourrait intervenir, le Président... et deux autres personnes susceptibles l'une et l'autre de le remplacer seront choisies par le Conseil de la Société des Nations..."). The law itself and its principles are of more import than the language in which it is expressed; the logic of institutions, the juridical mechanism and value of precedents are of more import than the grammar of two nations. We must not try to ressuscitate the dead or, like the famous judge killed by the wit of a Beaumarchais, wish for inordinate affection for "form".

Let us therefore have recourse to the substance of the law and its precepts. We have said that the law contains three primary reasons in favour of the unlimited competence of the Council.

1. — *First reason.*

The Council of the League of Nations, like the League itself (10), is a political organisation. It is political :

a) By the conditions of its creation which caused it to appear among nations, after the opposition of small and medium Powers, as the body in which States with general interests were "always" to have "a just majority" vis-à-vis States with limited interests who were given temporary seats "without any agreement being reached as to the method of renewing" these seats;

b) By the very incidents which in the first place led to the gradual development of this great organisation and finally to the reform of September 1926, of which, however, a severe critic has said that : "its main factor is a Rule of Election of the temporary Members of the Council *which is invested with*

(10) Larnaude (*La Société des Nations*, 1920, p. 8) writes : "The League of Nations is nothing more than a form of international political life." Scelle (*Une crise de la S. D. N.* ,1927, p. 2) regards it "as a phenomenon of international political and social organisation."

such a circumstantial character that it (the Assembly) impliedly reserves the right to waive the application thereof." (11)

Further, the Council of the League is political,

c) By the fact that it is recruited from the highest governmental or diplomatic ranks of the States;

d) By the nature of the general competence which it exercises in the interests of peace and which is shown with characteristic force by the very language of Articles 11 and 15 of the Covenant (12) : "war", "threat of war", "dispute likely to lead to a rupture", "circumstance whatever affecting international relations";

e) By the nature of the special political powers conferred upon it by the treaties in respect of the Government of the Saar, the protection of Danzig, supervision of relations between States and Minorities, etc.;

f) By its procedure, which, notwithstanding the occasional incorrect use of the word "jurisdiction" when speaking of the activities of the Council, has nothing in common with the jurisdictional procedure which always gives rise to a ruling by the judge with the force of legal truth;

g) Finally, by the methods adopted to settle disputes, another author has recently declared (13) that "they are all settled by diplomacy."

If, as we believe, such is the dominating character of the Council, what conclusion, from the point of view of the question under consideration, can be drawn?

The political power, in other words, the power to take in the name of all parties concerned such decisions as are most suited to the needs of the community (πολη) — irrespective of the size of that community — may well belong, according to the state of civilisation and period, exclusively or partially, directly or indirectly, to such or such organisation.

The varied nature of those organisations in no way affects

(11) Scelle, op. cit., p. 6.
(12) Rousseau : *La Compétence de la Société des Nations dans le règlement des conflits internationaux*, Paris, 1927, p. 20.
(13) Redslob : *Théorie de la Société des Nations*, Paris, 1927, p. 52.

the fundamental character of the political power, that of taking decisions, in principle and inasmuch as restrictive standards have not for reasons of pure expediency limited its absolute liberty of action, which still remains the rule. Now, if we ask how, by imperative orders, the power will be exercised to limit the possibility, which in principle is unlimited, of the political power of decision in the name of expediency, we are faced by two facts : 1) restriction — because it is a restrictive measure — must be laid down clearly, definitely and in such terms as to leave no room for doubt; 2) restriction — because it affects common interests — cannot be the act of anyone, it can emanate solely from the person or persons who are competent to speak on behalf of the interests of every member of the community.

Let us apply these ideas to the present case and to the question raised thereby : could the Treaty of Trianon impose on the Council of the League of Nations the *juridical duty* of appointing judges in order to enable the Mixed Arbitral Tribunal to continue its work in the agrarian affair? We reach the following conclusion : the Council of the League of Nations is above all a political organisation : in general, therefore, its decisions must be based on considerations of pure expediency. To assert (as the Treaty is said to have done by certain parties) that it must appoint the judges would be equivalent to restricting the power, in principle *unlimited*, of the Council to take a decision on the ground of expediency. For such a restriction of the liberty of the Council to be possible, it would have had to be laid down in incontestable, definite and suitable language ; now, we have already said that this quality is not inherent in the two texts — English and French — of the Treaty, since the former, more categorical, employs the word "shall", whereas the latter (which is authentic) uses the future. Moreover, for the liberty of the Council to be restricted, for its absolute power of decision on the ground of expediency to be replaced by limited competence and the obligation to appoint the deputy arbitrators, such restriction would have to emanate not from certain members of the League of Nations (the signatories to the Treaty), but from the whole League, that is, from all its members who are equally judges, but only in so far as one of the organs of the League may refrain, in the name of the public interest, from exercising its competence to the fullest extent.

2. — *Second reason.*

The necessity on the part of the Council to conciliate certain special powers, which the treaties deemed fit to confer upon it, with its constitutional competence — that which it holds under the Covenant — prevented it from judging whether it was legally bound to appoint deputy arbitrators.

The Covenant is the fundamental law, the supreme law for the embryo political international League, which consists of the League of Nations, and this law is more forcible than the decisions of the Assemblies or the resolutions of the Council. All the consequences arising out of this fundamental law for the organs of the League, in the form notably of the prerogative of general competence or special powers, partake of this force and this supremacy. If, therefore, it should happen that, in the highest interests of good understanding between nations on which peace depends, two or more members of the League agree to ask the Council to perform acts which are not included in the list of its special powers, it could comply only if such acts, in principle and consequence, were not contrary to the *constitutional competence* (general or special) of the Council. If the performance of such acts involved any disregard on the part of the Council of the fundamental principles of the Covenant and the end in view — peace among nations — the Council could not be obliged to perform them. Consequently, far from the Council of the League being the automatic executor of decisions which the parties have perhaps intended to compel it to take, the Council has one and only one duty, not that of obeying the parties, but that of considering whether, by acceding to their requests it would not be acting contrary to the letter, spirit, text and aims of the Covenant.

In the present instance, therefore, one single duty was incumbent on the Council and would again be incumbent on it in similar circumsances, namely, that of deciding with the greatest degree of conscientiousness whether the appointment of deputy arbitrators (provided that were legally possible) would serve the ends contemplated by Article 11, paragraph 2 of the Covenant : peace itself or the good understanding between nations upon which peace depends. When the question is asked in this way and the second point decided, is it not solved without

any necessity of insisting upon it? Consequent upon the decision of January 10th, 1927, Roumania, placed by the award of the Mixed Arbitral Tribunal in presence of an exceeding of powers by that organisation, withdrew her arbitrator for all agrarian questions. The appointment of a third arbitrator would obviously not change the trend of the decisions of this jurisdiction of three : the deadlock in the relations between two neighbouring countries as the result of the decision of the Mixed Arbitral Tribunal would be intensified by the fact that the same cause would give rise to the same result : the prolongation of the dispute would render it more acute. To enable the Arbitral Tribunal by the appointment of deputy arbitrators to resume its examination of the agrarian affairs, would undoubtedly be to protect the interests of a jurisdiction accused of an exceeding of powers by one of the parties and admitted as such by the doctrine of incontestable authorities (14), but it would not be to protect the higher interests of peace.

3. — *Third reason.*

Far from its being the duty of the Council to appoint deputy arbitrators to the end that the Mixed Arbitral Tribunal may be able to continue its work in the "agrarian affairs", the decision of January 10th, 1927, by reason of its text, imposes upon it a duty in the circumstance to abstain from appointing them, even had it the right to do so.

The fact is that power, even based on political expediency, as in the case of that conferred upon the Council by Article 11, paragraph 2 of the Covenant (15), cannot overstep the limits of the law, or, when there is no law, the limits of equity or morality. This, however, is what would happen if the Council considered itself bound to appoint, and appointed arbitrators in order to allow the Mixed Arbitral Tribunal which gave the award of January 10th, 1927, to resume its labours.

It is no longer necessary to produce proof that this decision is an exceeding of powers. This was admitted by the eminent

(14) See J. Basdevant, G. Jèze, N. Politis, *Les traités de paix ont-ils limité la compétence législative de certains Etats*, in the *Revue du Droit public et de la Science politique en France et à l'Etranger*, 1927 (September), p. 442 et seq. Adde Alejandro Alvarez : *La réforme agraire : le litige hungaro-roumain devant le Conseil de la S. D. N. Europe Nouvelle* of Oct. 20, 1927.

(15) See the second point of this statement.

jurists whom the "Committee of Three" consulted and whose opinion they accepted (16); further, the exceeding of powers is shown clearly from the facts of the case. In fact, for the Mixed Arbitral Tribunal to have been able validly to declare itself competent to judge of the damage to the property of Hungarian optants in Transylvania, this damage must have arisen out of the measures of liquidation prohibited in the transferred territories by Article 250 of the Treaty of Trianon. Now, without misinterpreting both the meaning of liquidation and the nature of the agrarian measures applied under the Roumanian legislation, it would be impossible to regard as liquidation measures of general application which, against compensation (though that may be deemed inadequate by the interested parties), have deprived the optants of the large properties affected by the agrarian reform. What, as a matter of fact, is liquidation? An operation whose origin and aim are a direct consequence of the late war. The first of these points has been clearly explained by Professor Gidel in his book *le Traité de Versailles et les biens privés ennemis* (17), the second, in particular, has just been explained by Professors Jules Basdevant, Gaston Jèze and Nicolas Politis, Greek Minister in Paris, in their remarkable work :"*Les Traités de paix ont-ils limité la compétence législative de certains Etats* (18)." "The system of the liquidation of property (German)" they write, "was for the purpose of supplying the Allied and Associated Powers with reparation funds when the resources (of Germany) are deemed inadequate to ensure complete reparation of the damage arising out of the war." "Therefore", they conclude, "measures of liquidation have two essential

(16) Declarations of Count Apponyi at the meeting of the Council of September 17th 1927, at 3.45' p. m. (Doc. C, 47th Session, Minutes 2 (1), p. 11 at top). "He (the British representative) said that, according to the opinion of the eminent jurists consulted by the Committee of Three and whose opinion the Committee of Three has accepted — and this has not been so clearly stated anywhere in the report, — *the Mixed Arbitral Tribunal had exceeded its powers...*"

(17) Page 61, Professor Gidel *writes :* "During the war, thanks to the institution of measures of sequestration, it was possible to safeguard the property of physical and moral persons with which economic relations were prohibited. But after the war, in view of abuses by our adversaries and the responsibility of the Empires which had provoked the war, it was impossible to base the new régime on the pure and simple restoration of pre-war conditions, and the liquidation of sequestrated properties became a necessary measure of liberation inevitably imposed on nations whose material and moral responsibility is unlimited."

(18) *Revue du Droit public et de la Science politique*, 1927, p. 418.

characteristics : 1) they are acts of war or the consequences of war; 2) they only affect enemy property." If the measure has no close connection with the war of 1914-1918, that is, if it is not the direct and necessary consequence of war, and if it does not refer exclusively to enemy property, there is no liquidation under Article 297 of the Treaty of Versailles or of Article 232 of the Treaty of Trianon, with which we are now dealing, and the Mixed Arbitral Tribunal provided by Article 239 of that Treaty is incompetent to judge the consequences of the measure. This being so, what do we note in the case of the Roumanian legislation relating to agrarian expropriations : 1) far from being confined to Hungarian nationals and injuring those nationals alone, the measure has been general, affecting without distinction, irrespective of nationality, the owners of land over a certain acreage; 2) the Roumanian agrarian legislation was not the direct and necessary consequence of the war of 1914-1918. This is proved by two considerations : *a*) It is an acknowledged fact that the idea of the reform dates from long before the "world war", to be exact, from the time of the agrarian revolution of 1907 (19) ; the law of July 17th, 1921, applicable to the Former Kingdom, that of July 30th, 1921, which provided for the expropriations in Transylvania. The Banat, Crisana, were the completion of a work independant of the war of 1914-1918 and postponed on account of the war ; *b*) Roumanian episode of a social movement which gave rise to manifestations in Lithuania (law of February 15th March 20th 1922), in Czechoslovakia (law of April 16th, 1919), in Latvia (agrarian law passed at the third reading by the Constituent Assembly, September 16th, 1920), and the possibility of which was even contemplated in Germany (Constitution of August 11th, 1919, Articles 153 and 154), the agrarian legislation in Roumania has so little connection with the war of 1914-1918, she regarded it we might say with so much abhorrence that her whole aim and idea was, by the creation of small peasant holdings, with the internal disturbances to be feared if things remained as they were, to prevent a recurrence of the external conflicts leading up to social revolution.

(19) See *La Réforme agraire en Roumanie et les Optants hongrois de Transylvanie devant la S. D. N.*, March-July 1923. Paris, Jouve et C^ie^, publishers, p. 34 et seq. A Constituent Assembly was formed in 1914 with a view to modifying the Roumanian Constitution and to introducing into it the principle of expropriation for reasons of social welfare.

The foregoing considerations justify the conclusion therefore that the executive measures of Roumanian legislation do not constitute the liquidation in the transferred territories forbidden by Article 250 of the Treaty of Trianon, and that the Mixed Arbitral Tribunal could not declare itself competent, as it has done, to judge the affair in a general manner.

We are not guilty of any disrespect towards the juridical conscience of the majority which, within this Tribunal assumed the responsibility of the decision of January 10th, 1927, in stating that this decision is an exceeding of powers because the arbitral judge declared a series of questions to be within his competence when they were not ; not to draw the conclusion of an exceeding of powers from the point of view under discussion would be a legal omission.

The exceeding of powers of the arbitral judge has the effect of rendering the award null and void. Entrusted by the parties to pronounce on one or more given points, the arbitrator has not the slightest authority to pronounce on those not submitted to him. As soon as the arbitrator exceeds his competence he becomes arbitrary; his action, which makes for peace when used on behalf of one or other of the parties, makes for force and violence when used against both parties; without any justified basis, it is only an illegal interference in disputes for which international law, which lags behind national laws, has not yet imposed the compulsory judge; without basis, it does not fall to pieces, because it has never existed. That which exists is the unauthorised exercise of a function, namely, the juridical function.

Against such an act, international law has unquestionably not provided penalties such, for example, as those imposed by more than one legislation against officials who exceed their powers. It is none the less true that to encourage the repetition of acts of this kind (which would be the case if, completed by the competent authority, the above-mentioned organisation were enabled to maintain its point of view) would constitute an act contrary to international order. It cannot be the duty of any authority whatsoever to bring about such a result.

The foregoing considerations show that it was not the duty of the Council of the League of Nations to appoint deputy arbitrators. In the present circumstance, had it the power to do

so? (20). Nothing could be more removed from the real facts. The Council of the League had not and has not, in our case, the power to appoint deputy arbitrators.

This will be conceded without difficulty : to appoint deputy arbitrators subsequently to be entrusted with the task of defining the law between parties by a compulsory decision amounts to imposing on each party a restriction which, to be legal, should previously have been formally accepted by both parties. Is this acceptance provided for in Article 239 a) of the Treaty of Trianon (taken from Article 304 (a) of Treaty of Versailles) and § 1 of the following Annex? This is the moment again carefully to read these instruments in their own text and not in the spirit which might be bestowed upon them by a unilateral interpretation.

§ 1 of the Annex says that if, "for any reason whatever a Member is unable to discharge his functions, the same procedure will be followed for filling the vacancy as was followed for appointing him." In presence of the situation created by the withdrawal of the Roumanian arbitrator, our whole attention must therefore be concentrated on Article 239 (a) paragraphs 1, 2 and 3 of the Treaty of Trianon.

What do we find in this text?

1) On the one hand, it provides for the establishment of the tribunal; 2) on the other hand, foreseeing, under sub-paragraph 3 of point *a*), that a vacancy might arise within the tribunal, it deals with the continuance of its functions. The aim is ideal; if the method of realisation conceived by the treaty is less so, nothing can be done, even by the Council. The proof of this is furnished by a perusal of the text reading the sub-paragraphs of point *a*) of our Article in the following order : 3, 2, 1. If in case there is a vacancy, or if a member is unable for any reason whatever to discharge his functions, a Government does not proceed within a period of one month to appoint a substitute for the national arbitrator who has died, is ill, has retired or is unable for any reason whatever to discharge his functions, "the other Government" says

(20) It is thus that the question, at least in part, was placed before the Council itself on September 19th 1927 (Meeting of afternoon). "The points of international law raised by the matter are important", said M. Loudon. "First, there is the question whether, under Article 239 of the Treaty of Trianon, the Council has the duty, or only the right, to nominate substitute judges on the Mixed Arbitral Tribunal." See Doc. C. 47th Session, Minutes 4 (1), p. 4.

the text (Article 239, sub-paragraph 3) shall choose the person to take his place. This power of the other Government, however, is not discretionary. Its choice is restricted : Article 239 (3) expressly says that it can be exercised only "from the two persons" ("other than the President") who must satisfy certain conditions. Sub-paragraph 2 of Article 239 tells us who these two persons are. 1) They shall be nationals of Powers that have remained neutral during the war (Article 239 (2) *in fine*) ; 2) they are exclusively the same (condition of sub-paragraph 3) as those chosen by the Council (in application of sub-paragraph 2) to take the place, in case of need, of the President of the Tribunal, if the case provided for in sub-paragraph 1 *in fine* of Article 329 *a*) arises, to wit, if before the necessity of appointing the President arises, the Governments concerned have failed to reach agreement.

From which it follows that, in regard to the Council, if there is no necessity to replace the President of the Tribunal, or if, in the event of its being necessary to choose a President the Parties reach agreement as to the choice, there is no longer any reason for the Council to appoint the two persons — who are the same — envisaged both in sub-paragraphs 2 and 3 of Article 239 (*a*) of the Treaty of Trianon. In the dispute, which last September brought the Roumanians and Hungarians before the Council, the question of the Presidency of the Tribunal is outside the discussion. The agreement contemplated by paragraph 1 *in fine* of Article 239 (*a*) and by the opening words of paragraph 2 has not been reached. The Council, therefore, has not to appoint the "two other persons", so that in so far as concerns the "other" Government (the Hungarian Government), the latter, even though it wished to do so, could not in its own favour apply the provision of paragraph 3 of Article 239.

The precedents which may be invoked against this conclusion are without force.

On March 11th, 1927, the Council of the League of Nations appointed the President of the German-Polish Mixed Arbitral Tribunal (21) to replace the resigning President, but this appointment, made upon the request of the German and Polish Governments, which had not been able to agree as to the nomination of a new President, was in strict conformity with the provisions of

(21) See *Minutes* of the 44th Session of the Council. *Official Journal of the League of Nations*, April 1927, p. 399 and Annex 951, p. 591.

§ 1 of the Annex to Article 304 of the Treaty of Versailles from which Article 239 (*a*) of the Treaty of Trianon is taken.

Nor could another and older precedent be accepted.

In January 1923, by way of reprisal against events which were still in the memory of all, and on the excuse that the political situation at that time did not permit of any useful co-operation between the German and French organisations, the German arbitrator, duly convoked, did not appear at the meeting of the Franco-German Mixed Arbitral Tribunal (22).

No doubt, at that time, even if the Presidents of the Mixed Arbitral Tribunals were chosen conjointly by the parties concerned, the Council of the League (23) sometimes appointed neutral arbitrators to take the place of the defaulting national arbitrators. There is a point however that cannot be forgotten : in 1923, the absence of the German "organ" was put down to a political situation. In 1927, Roumania withdraws her arbitrator. Why? Because she believes she has reason to complain of a political situation? Not at all; because she has reason to complain that the arbitral tribunal has exceeded its powers. This being the case, is she violating the recognised legal principles of arbitration? Here again, no. Professor Mérignhac (*Traité théorique et pratique de l'arbitrage international*, p. 230 et seq.), wrote, as early as 1895 that " Owing to the gravity of the interests at stake the arbitrator must have the right to withdraw by a simple measure of agreement without even being obliged to state the reasons for his withdrawal..." Thus cannot he also do so when he can plead, not a political situation, but non-observance of the law? And in this case can it be admitted that his place could be taken by someone else? We will answer this question by referring to another author whose authority still lives. In his great work, " *Le Droit international théorique et pratique* " (Vol. 3, p. 482) on arbitration, Calvo admits the replacement of the absent arbitrator only when it is proved that absence was due to ill will on the part of that arbitrator. To sum up : in 1923, on the ground of political events, which had no connection with the work of the Mixed Arbitral Tribunal, and by way of reprisals against a troublesome occupation, a State withdraws its arbitrator and thereby disor-

(22) *Recueil des décisions des T. A. M. institués par les Traités de paix* N° 24 (March 1923), p. 870 et seq.

(23) See the *Minutes* of the 23rd Session of the Council in the *Official Journal* of March 1923, p. 242 and Annex 446, p. 300.

ganises the Mixed Arbitral Tribunal. In 1927, another State, whose law is assailed by an arbitral award which was an exceeding of powers, exercises its right to stop the consequence of this exceeding of powers... What was regular in 1923 when, not on the ground of the Covenant, but of instinct, on that of arbitration and to put an end to an obvious attitude of ill will, the Council appointed neutral arbitrators to take the place of the defaulting national arbitrators, would no longer be regular in 1927 against a State which does not plead the political situation, but which, adopting a very different attitude, proves an exceeding of powers on the part of the tribunal and consequent prejudice to itself.

Second Point.

The Council of the League of Nations was validly able to recognise the Roumanian claim on the basis of Article 11, paragraph 2 of the Covenant, notwithstanding the decision of the Mixed Arbitral Tribunal of January 10th, 1927.

This assertion is based on the following considerations :

I. — *The scope of Article 11, paragraph 2 of the Covenant, in the language referred to above, is unlimited.*

It is in this article, in the name of any threat to peace or to the good understanding between nations upon which peace depends, that the Council finds the basis for action which, in order to realise the object of the article, must be and is freed by the text itself, in respect of its methods of application, from all limitations. Dominated by the memories of the war, the Covenant has inscribed the word " Peace " on the frontal of the new international order; it has entrusted the safeguarding of that peace to the Council, above any other organ of the League ; it had to give the Council absolute liberty as to the methods and formulas best calculated to ensure that peace.

It is worthy of note that all those who on any occasion whatsoever have had to give a doctrinal opinion on the scope of the powers conferred on the Council by Article 11, paragraph 2 of the Covenant hold that these powers are unlimited.

Professor Redslob, the author of the most recent and most systematic book in France on the League of Nations (*Théorie de la Société des Nations*, Paris, 1927), writes (p. 50 et seq.) in regard to Article 11 that : " The scope of this article is extremely wide. It confers upon the League powers which, we might say, are

unlimited. " Thinking immediately of the nature of the methods of action of the League under the same article, the author adds : " It authorises it, nay more, it obliges it to employ all the methods calculated to maintain peace in the case of war or the mere threat of war... " And, still further, he defines his thought as follows : "We are in presence of a block of marble the substance of which has been touched by no chisel. Its potentialities are unlimited. " At almost the same time that M. Redslob, in his book on the *Compétence de la Société des Nations dans le règlement des conflits internationaux* (Paris, 1927), analysing (pp. 29-30 and notably p. 33), the character of the legal scope of Article 11, M. C. Rousseau, in words very similar to those of Redslob, states "that it would be impossible to imagine a more general formula than that of Article 11." Why should this astonish us, since " the Council and the Assembly " are " above all, political organisations entrusted with the political settlement of international disputes " (Ibid, p. 34). Unlimited powers resulting from a text which intentionally lacks precision, these are the features always noted by the commentators of Article 11. For it must be observed that doctrine is always agreed on this point. That of Redslob in 1927 is only an emphasized reproduction of that of Larnaude, writing in 1920 (*La Société des Nations*, p. 12) : "The language of the law is decisive ; politics, on the contrary, express all decisions in flowing and elastic terms... A perusal of the most important articles of the Covenant shows this character of deliberate lack of precision. " And the first article of the Covenant which illustrates this assertion is precisely Article 11.

It is not only the specialists on the League of Nations who, in France, insisted and still insist on the unlimited character of the powers which Article 11, taken as a whole, have conferred on the Council. When finishing his *Traité de Droit international public* (Vol. 4, 1926, p. 667) not many days before the pen fell from his hand in the silence and contemplation of his last meditations, Paul Fauchille, passing a brief judgment on Article 11 (for his hour was at hand), noted that the Covenant was very vague : " It must therefore be inferred that the Council and the Assembly will have entire liberty in the choice of measures. "

Germany is of the same opinion. Schücking and Wehberg say so pointblank (Die Satzung des Volkerbundes, 2nd Edition,

Berlin, 1924, pp. 468-469, D) in commenting on this article : What is required, " according to the special provision of paragraph 1, is above all to find a speedy solution of the question." As to the appropriate measures (E. Die geeigneten Massnahmen, p. 469), these are not merely opinions, or intervention between the two parties, but also any measure which may seem calculated to maintain effectually the peace of the world, a formula which the authors describe as valid for paragraph 2 as much as for paragraph 1.

In direct connection with the above theory, Strupp (*Elements du droit international public universel européen et américain*, Paris, 1927, p. 36), when examining Article 11, also believes that " it is for the League of Nations to determine what measures it considers calculated to bring about the desired result."

It was, moreover, the theory of the unlimited competence of the Council, in virtue of Article 11, which the eminent Professor of the University of Rome, Signor Scialoja, submitted to the Council itself, at its Meeting of September 19,1927 (24).

What is the use, however, of reviewing thus a constant theory which was solemnly confirmed, in the Council itself, in a passage which should be quoted at length from the " Report approved by the Committee of the Council, on March 15, 1927, concerning Point 1 b of the French proposal for the reduction of armaments." — "It is impossible", we read in this document (25), " to place beforehand in rigid categories the infinitely varied events of international politics. It is impossible to circumscribe by resolutions, recommendations or expressed wishes the very extensive rights arising for the League out of its essential duty : effectually to safeguard the peace of nations. And further on : d) " In virtue of Article 11, any war or threat of war is declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations."

" If there is no threat of war, but some circumstance threatens to disturb the good understanding between nations on which peace depends, this circumstance may be brought to the attention

(24) *Minutes of the 45th Session of the Council, Official Journal of the League of Nations*, July 1927, Annexe 96 *a*, pp. 832-833.

(25) See Doc. C 47th Session. *Minutes* 3 p. 2 : "What is, in that case the competence of the Council under Article 11 of the Covenant? This competence is not limited in any way."

of the Assembly or the Council by any Member of the League, so as to enable the Assembly or the Council to consider what should be done to restore this good understanding between nations "...

Thus the theory recalled above—that of the unlimited powers of the Council — " a Court of Justice " entrusted with restoring a good understanding between nations by any appropriate means, is the only one which can be derived from the language of the whole of Article 11, from its origin and from its nature.

a) Let us re-read the French text of Article 11, paragraph 2 : " Il est, en outre, déclaré que tout membre de la Société a le droit, à titre amical, d'appeler l'attention de l'Assemblée ou du Conseil sur toute circonstance de nature à affecter les relations internationales et qui menace, par suite, de troubler la paix ou la bonne entente entre nations, dont la paix dépend ". — " Sur toute circonstance " (any circumstance whatever)... The expression could not be more comprehensive : it embraces—as the practice of the League of Nations shows more and more — all situations, whether political or juridical (and even those in which law and politics are closely intermingled) and all acts : acts creating legal results (e. g. the affair of the expulsion of the œcumenical patriarch, February 11th, 1925), executive acts (affair of the Upper Silesian frontiers, August 29th, 1921), collective material acts (e. g. affair of the incursion of bands of Bulgarians, April 20th, 1923) or individual material acts.

Only one restriction is placed on the power which the Council possesses of dealing with "any circumstance whatever affecting international relations which threaten to disturb international peace or good understanding." This is to be found in the closing sentence of Article 11, paragraph 1, to which paragraph 2 supplies the inseparable sequel and conclusion : the Council cannot submit the question to itself. In order to take action it must wait until, at the request of any Member of the League, the Secretary General has summoned a meeting. But once it has met for the purpose of safeguarding peace, it recovers its complete liberty. The English text of Article 11, paragraph 1, is more expressive on this point than the French : " And the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations " (toute action qui pourra lui paraître sage).

Thus even if the question which may threaten good understanding is juridical in origin, the solution which the Council may propose need not be so in tenor, is it deems this to be wise for the sake of the peace for which it is responsible. The Council is dedicated by the Covenant, in virtue of Article 11, much more to the " safeguarding of peace " than to the guardianship of the law, which is rigid in its principles and admits of no compromise. — Since this is so, shall we not acknowledge that its authors were right not to specify the nature of the means to be employed by the Council and to concern themselves only with the " effectual " results of its action.

b) There is no need to be astonished at all this mechanism.

Redslob has already recalled this with reason (*op. cit.*, p. 51) : the empirical method of the Anglo-Saxons here also " has set its stamp on the Covenant of the League." Unchanging through the centuries, the race has conferred on the Covenant the elasticity of its constitution, which was at the root of a great part of the success of its enterprises and which, transported into the sphere of its relations with the Dominions, produced that great result : an empire the bonds of which, though juridically loose, yet make for strength.

Moreover all this is not so new as might be supposed. Institutions evolve and become interrelated even though the mesh be invisible.

Article 11, paragraph 2, interpreted aright, is a new form of a procedure which has long been known in international relations, and is here transformed, rejuvenated and purified. To reveal this aspect of its origin is to confirm its meaning and its scope : the unlimited powers which it confers on the Council. The name of this procedure is *Intervention.*

There is no need to dwell on its antiquity. The instrument of States which have material force at their command, intervention was sometimes exercised by a single Power sometimes by a group of Powers united by a temporary interest in solidarity; it was never exercised by all the States collectively, speaking on behalf of the international community. If intervention was sometimes exercised in the service of right in order to obtain reparation for some unintentional petty offence, or the violation of a contract, or to ensure respect for the most essential rights of humanity, very often, more often than not, it was employed on behalf of

some personal interest. " The personal interests (of States) ", writes P. Fauchille in the paragraph on Intervention (*Traité de Droit international public*, vol. I., Part I, Peace, p. 545), " were almost always the sole rule for their behaviour. When they thought that their policy or their ambition would gain by intervening in the affairs of another State, they invoked the right of intervention. If they thought it to their advantage to avoid or prevent the active intervention of other States, they contested their right to intervene." Hence the acts of interference in the internal life of weaker nations or in their internal destiny, which conceal personal designs when they do not openly betray or proclaim them, even while the intervention is alleged to be action to maintain the balance of power ; hence also, by way of " counter-intervention " (one offence begetting another where there is no tradition or treaty to prevent the abuse of these two, intervention and counter-intervention, either as regards the acts which justify them or the measures which set them in motion), a progressive decline or lapse into acts of war and into war itself (so-called peaceful blockade, occupation, bombardment).

Article 11, paragraphs 1 and 2, was an attempt to remedy some of these defects. While inheriting the idea contained in the Russian Note submitted in 1899 to the first Peace Conference, on the subject of mediation, which is also, to some extent, intervention (26), it adds in reality a new contribution to the work of elucidating this obscure chapter of pre-war international law, the chapter on " Intervention ". Henceforth, in virtue of the Covenant and its metamorphoses, intervention (27) will, for the purposes which Article 11 has in view, be handled, in practice, exclusively by a body which is developing — one might almost say becoming gradually democratised. In this body, the small nations, a constant factor for moderation, who formerly had to submit to intervention, will permanently throw their weight on the side of compromise. This Body (in which each acts as a check on the other) is more and more in the public eye and subject to the criticisms of the world. And since the Covenant has bestowed upon it a moral responsibility which bears the marks of its origin and authorship, because this Body has to take

(26) Olof Hôjer, *Le Pacte de la Société des Nations*, Paris 1926, p. 190.

(27) This is the aspect which M. Le Fur discusses in his article : *Philosophie du droit international*, See *Revue générale de Droit international public*, 1921, p. 598.

action to safeguard peace otherwise it would be responsible for the consequences, — it cannot take refuge in abstention ; it must, with the fixed determination to obtain a practical and effectual result, make use of any means which the Covenant places at its disposal, *a*) material force, perhaps, and if it is necessary to go to such lengths, but force only in the last resort (whereas Intervention of the old type often had recourse to it straight away), — *b*) certain provisional measures (occupation of a territory by armies of small States), good offices, which consist merely of bringing the Parties together,— *c*) conciliatory measures, suggesting a solution of the dispute.

It was on this last alternative that the Council decided, when, on September 17th, 1927, it proposed that Hungary and Roumania should adopt the three principles recalled above when setting forth the facts ; this Roumania did immediately, subject to Hungary's doing likewise. By so acting, the Council remained strictly within the letter and the spirit of the Covenant, which gives it unlimited powers for safeguarding peace, on condition that in making use of these powers it does not set the destructive example of violating the law.

II. — Can it be said to have violated the law in urging the parties to disregard the award of January 10th, and to substitute for its ruling the three principles which it enunciates ? — Was it misapplying the law when it set over against res judicata by the Mixed Arbitral Tribunal the powers of Article 11, paragraph 2 ?

To maintain this would be an error.

A. — The authority of *res judicata* attaches only to a definitive award. — Here we shall be challenged. In Article 239 g of the Treaty of Trianon, the High Contracting Parties agreed " to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive." True, but with this reservation, which is of the very essence of arbitration, and which is based on public order and recognised both by the theory and the precedents of arbitration, namely that when the award given there was no exceeding of powers (as in this case, see above, p. 377). How can an award be definitive when it does not exist? Before it can

last and last for ever, it must first exist. The award of January 10th, 1927, definitive ? The award of January 10th, 1927, in force as res judicata ? This is an impossibility. There are only two alternatives : Either the exceeding of powers is certain and incontestable, which, by the way, we believe we have demonstrated it to be; in which case the award never existed, and no judge is required to affirm the fact; or, as M. Politis wrote in 1914 (*La Justice Internationale*, p. 92), long before the present case arose, " if the exceeding of powers is not obvious, the course open to any who choose to take it is to come to an understanding with the opponent with a view to amicable agreement or renewed arbitration." Arbitration or an understanding (such as Roumania asked the League to define in accordance with the spirit of the Covenant, which is the spirit of conciliation even more than of arbitration), it matters little. What matters is that, even on the second hypothesis, the award is not definitive.

B. — *But even if the decision of January 10th, 1927, had had the force of res judicata,* this force could not have constituted an obstacle to the Council's acting, as it has done, on the basis of Article 11, paragraph 2.

The respect due to *res judicata* has its roots in the need for stability and social peace (see Lacoste : *De la chose jugée en matière civile, criminelle, disciplinaire et administrative*, 2nd Edition, Paris, 1904, and G. Jeze, *Principes généraux de droit administratif*, 1914, p. 149). Because public tranquility demands that certain questions should not be repeatedly reopened, among which are those settled by a definitive decision of the judge, the need for regularity, peace and order among citizens of the same community having been learned in the course of time, the fundamental rule was laid down which is expressed in the old adage : "*res judicata pro veritate habetur.*" —The respect for *res judicata,* which was intended to pacify, to forestall vengeance and to prevent for ever the return of private strife, would lose its *raison d'être*, and would lead to the opposite result from that aimed at : public tranquility, if, owing to the circumstances, the obligatory and forced respect for *res judicata,* were to result in the aggravation of a certain social or political condition. From being a rule of wisdom, order, conservation, the rule would become, in that case, the source of fatal errors, disorder and destruction. — The wisdom of governments has caused them to

proclaim and to obtain acknowledgment of their right to abstain from applying the law when public order demands that the law and its effects should temporarily be set aside (see Barthélemy, *De la liberté du gouvernement à l'égard des lois dont il est chargé d'assurer l'application*, in the *Revue du Droit public et de la Science politique en France et à l'étranger*, 1907, pp. 305 et seq.). The wisdom of the judges did not fail to provide for this difficulty when they acknowledged that those on whom the heavy task of preserving order in the State devolves had the power to ignore, temporarily or permanently, the respect due to *res judicata*.

The case — a celebrated one in French jurisprudence — which brought out this fundamental truth is not very far behind us. It has striking lessons to teach us in the present circumstances.

It would be superfluous to take the reader through the maze of facts and procedure which led to the decision given, on November 30th, 1923, by the Council of State in this country in the case of Couitéas v. the French State (see *Sirey*, 1923-3-27 *et seq.* with a note by the Dean, M^e^ Hauriou and the conclusions of the Government Commissioner, M. Rivet; see also the note by Professor Gaston Jèze in the *Revue du Droit public et de la Science politique en France et à l'étranger* 1924, pp. 208). In this case, " the Council of State had to decide whether a colonist settled in Tunisia, to whom the administration persistently refused their support against the natives for the execution of an award of the civil Court, which had acquired the force of *res judicata*, was entitled to compensation for the dramage incurred." The case, which was of exceptional gravity, opposed to principles, circumstances which affected the tranquility of a whole region; for it cannot be doubted (the official explanations are there to prove it, see *Sirey*, 1923-3-64, Column 2) that the forced evacuation, in virtue of the judge's decision, of large tracts of land occupied by " a whole tribe " were bound to provoke resistance which might well develop into a general rising.

What did the Council of State decide?

Its decision is no secret. In accordance with the conclusions of its Government Commissioner, it said, as G. Jèze has expressed it (article mentioned above, p. 210), when summarising the argument of this eminent jurisdiction : " It is the Government's duty, when requested to put into force *res judicata*, to weigh the conditions of this execution and it is its right to refuse the cooperation

of armed force as long as it considers that this constitutes a menace to the order and security of the country ", as long as internal peace is imperilled. When the execution of *res judicata* is bound to have more serious consequences "for the peace of the community " than its non-execution, " it is in the Government's power to suspend or refuse the exception, as it is responsible for the order and security of the community " (*ibid.*, p. 211). — He adds that if from this non-execution (*ibid.*, p. 213), abnormal préjudice results, " it is equitable that pecuniary reparation should be made for this prejudice from the administrative resources " (28). But this point of view, which is defensible when the financial resources of the community are set over against private interests of strictly limited extent, becomes inadmissible if the unlimited extent of these interests is confronted with the impassable barrier of the preservation of the State.

Suppose we transport the principles of the Couitéas award from the limited sphere of national law and the interests of a private person and some hundreds of natives to the infinitely vaster domain of international law. The reasons on which they are based : the peace of the community, public tranquility, the imperative necessity for avoiding, not private war this time, but a disturbance of international relations which may lead to international war, are just as we found them a moment ago. *Let us suppose further*, in order the better to show that the cases are parallel — and while *maintaining strictly our contrary conclusions* — that the decision of the Mixed Arbitral Tribunal of January 10th, 1927, is innocent of any exceeding of powers, and let us ask ourselves what will be the effect of it in reality and in life. — The sentence admits the competence of the Mixed Arbitral Tribunal for "agrarian affairs" in Transylvania ; in other words, it recognises the competence of the Mixed Arbitral Tribunal to determine the conditions of the application of the Roumanian agrarian legislation to certain nationals of a foreign State who claim, not equality with the subjects, but real preferential treatment. (This treatment consists, above all, of the conservation in kind of their property, as an exception to the general dispossession or, accessorily, of the payment of indemnities, in compensation for property expropriated, which will take into account

(28) On this point (the right to compensation), the doctrine of the decision gave rise to contrary opinions.See D. Ducz, *La responsabilité...*, p. 55).

the depreciation in the currency of the country which has occurred *since the expropriation*). Consequently, the prospect which the award of January 10th, 1927, holds out is : either the disappearance of the small holdings of the peasants, which form the corner stone of social peace in Roumania, as the result of the collapse, in a whole section of the kingdom, of the agrarian reform, owing to the taking back of the land from its present holders, or else the instability of the finances, the overwhelming of the State financially by the weight of the indemnities which are *de jure* in excess of what is due and *de facto* beyond its resources.

In face of this peril, Roumanian opinion, already alarmed, may soon be in a ferment. — *Even if the award of January 10th, 1927, had been definitive* (which it is not), could the Council of the League of Nations, on the pretext of not interfering with its execution, let the public order and the peace of Roumania run the terrible risk of a Peasants' Revolt or of finanical collapse, that forerunner of revolutions? But the question is more comprehensive still.

Behind Roumanian public order, it is the public order of the whole of Europe, it is the peace of Europe and the world which is at stake. Even in the eyes of Hungary herself, who experienced the Red Terror of Budapest, Roumania stands on the banks of the Dniester, like a sentinel guarding a civilisation nearly two thousand years old, based on the family, on Christianity, on the liberty of individuals collaborating of their own free will, under the aegis of the law, in the interests of society; Roumania is an outpost in the service of all. If the great organisation entrusted with the sacred task of safeguarding peace had allowed her, if it were to allow her, to be molested in her public order, in her social peace, the sentinel would fall, and through the undefended breach would rush the reawakened spectre of universal war. The Council of the League of Nations could not desire this. *Even if no exceeding of powers existed,* in the interests of peace this great organisation would have been justified in setting aside the authority of *res judicata.*

Third Point.

In the circumstances, the Council of the League of Nations was not obliged to have recourse to the opinion of the Permanent Court of International Justice, and it was with reason that it

did not adopt the Hungarian proposal (see the intervention of Count Apponyi, Minutes of the third public meeting of the Council held on September 19th, 1927, at 4 p. m., p. 5) that the opinion of the Court be asked as to "whether the three principles formulated in the report of the Committee of Three and adopted by the Council were really well founded."

This affirmation is based on the following considerations :

I. — *There is no text in the Covenant which lays on the Council the duty of asking for the opinion of the Court on any question or point whatever.*

Such a conclusion could certainly not be drawn from Article 14 of the Covenant, which, in the French draft reads as follows; " (La Cour) donnera des avis consultatifs sur tout différend ou tout point dont la saisira le Conseil ou l'Assemblée ", whereas the English text is : " The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly. " It is certainly in this sense of a simple option and not of a duty that the best authorities interpret the competence which the Council possesses to ask for the opinion of this Court (see de Bustamente. *La Cour permanente de Justice Internationale*, p. 274, § 238). M. Politis writes to the same effect (*La Justice internationale*, p. 172) : " According to Article 14 of the Covenant, (the Court) is called upon to give an advisory opinion on any dispute or question referred to it by the Council or by the Assembly... "

From this first principle, which cannot be questioned, it follows that the Council, on its moral responsibility, may, without even giving reasons for its refusal, refrain from acceding to the wish expressed by a State, that, on some dispute or some question, the opinion of the Court be asked for (see, on this point, the *Memorandum* of Judge John Basset Moore, Publications de la Cour, Series D, N° 2, 383).

The precedents supplied by the practice of the Council confirm this view. Professor Manley O. Hudson took care to point this out in his very learned essay, published in November 1925, on the " advisory opinions of the Court " (*The advisory opinions of the Permanent Court of International Justice*, publication of *International Conciliation*, November 1925, N° 214, p. 347 et

seq.). When, in 1923, the Corfu affair raised the question of the interpretation of Articles 12 to 15 of the Covenant, several members of the Council were in favour of asking the Court for an advisory opinion. In the course of a prolonged discussion, a great authority, the Swedish representative, the much regretted Mr. Branting, urged that the Council should ask the opinion of the Court (29). Nevertheless the proposal was rejected and it was to a special Committee of jurists that the Council entrusted the task of examining the questions drawn up by itself (30).

Another precedent, also recalled by Manley O. Hudson, is more typical, for the request for an opinion was made, not by a State, member of the Council, but by one of the parties to the dispute. In 1923, the Council of the League of Nations was again strongly urged, by the Lithuanian Government, to obtain the opinion of the Court on various questions relating to the action of the Council in the dispute over Vilna between Poland and Lithuania. The Council decided not to ask for the opinion of the Court. This abstention on the part of the Council was not approved by the Lithuanian Government ; it therefore placed its request on the agenda of the 4th and 5th Assemblies, but later, in each case (31), it withdrew the request.

II. — *From the fact that the Council is not obliged to ask for the opinion of the Court, it does not follow that it is always at liberty to ask for it.*

Its competence is not discretionary, as one might be tempted to conclude from the English text of Article 44 *in fine* : " The Court may also give an advisory opinion upon any dispute or questions referred to it by the Council or by the Assembly. " If the real juridical régime of the opinions of the Court is to be understood, this text must be combined with general legal principles and with the other principles of the Covenant. In this connection, several observations must here be made, the

(29) Minutes of the 26th Session of the Council of the League of Nations, *Official Journal of the League of Nations*, November 1923, pp. 1300 *et seq.* and. p. 1350.

(30) *Ibidem*, p. 1352.

(31) Acts of the 4th Assembly. Plenary Meetings. *Official Journal of the League of Nations*, p. 2 and Minutes Ist Commission. Annex 3, pp. 54, 56. Adde Acts of the 5th Assembly, Plenary Meetings, *Official Journal of the League of Nations*, pp. 10 and 115.

application of which to the case in point will corroborate the opinion advanced with respect to the affirmation made in regard to this third point.

FIRST PROPOSITION. — *The Permanent Court of International Justice, being an essentially juridical organisation, must not be drawn into political questions.* The Council could not therefore have asked it, in September 1927, for its opinion on a question which has left the sphere of law and jurisdiction and has entered into the domain of conciliatory intervention.

What was aimed at when the Court was created was " a veritable and really permanent jurisdiction, composed of professional judges... giving their awards in an atmosphere of justice free from all political preoccupations, forming a body capable of creating traditions and drawing up a system of jurisprudence." No commentary could better describe the true character of this Court than these lines taken from M. Politis' work (*La Justice Internationale*, p. 157).

The personnel of the Court, to begin with, makes it a juridical body by origin and by temperament. To realise this, it is sufficient to refer to the very suggestive table, patiently drawn up by Strupp (*Eléments*, pp. 272-273), of the professions exercised by the Members of the Court. Out of sixteen names, there are nine jurists who are professors of law, two magistrates, one Lord Chancellor, one Minister, and one ex-Minister, of Justice.

The Court is given up to the examination of juridical questions by its competence *ratione materiae*. This competence extends, as is well known, to all cases submitted to it by the parties concerned and to all cases specially laid down in the treaties and conventions in force. The careful review in which M. Blocizewski recently passed all these cases (see *La compétence de la Cour Permanente de Justice Internationale*, in the *Revue Générale de Droit International Public*, 1922, p. 27 et seq.), demonstrates superabundantly that the Court is on a strictly juridical plane. The demonstration is supported by the famous Article 36, paragraph 2, of the Statutes of the Court, which extends the obligatory competence of the Court only to all or some of the categories of disputes of a juridical order which are concerned with : *a*) the interpretation of a treaty; *b*) any point of international law; *c*) the existence of a fact which, if accomplished,

would constitute the violation of an international undertaking; *d*) the nature or extent of the reparation due for the non-fulfilment of an international undertaking.

What rules must the Court apply? Article 38 gives the answer : 1) international conventions, whether general or special; 2) international customs, as proof of a general practice accepted as lawful ; 3) the general legal principles recognised by civilised nations; 4) judicial decisions and the publications of the best qualified authorities, as an auxiliary method of determining the rules of law. (Note that equity, which is not excluded, may serve as a basis for the Court only if the parties are in agreement.) There again the judicial nature of the Court is manifested, since it judges according to established law.

As for the jurisprudence which the Court is drawing up, its whole value, which is essentially juridical, is brought out in the following comparison, publicly made on June 4th, 1926, by one of the most eminent authorities on international law, M. Weiss, Vice-President of the Permanent Court of International Justice, between the work in progress of the new Court and that carried on by the Court of Arbitration : "The arbitral awards of The Hague, sometimes inspired by considerations which are not exclusively juridical, succeed one another and are not always alike. They are often the echo of the individual and dissimilar opinion of their drafter, and sometimes also they are the fruit of more less laborious diplomatic compromises, rather than the sure affirmation of an incontestable and uncontested rule of law. This is the defect which the Permanent Court of International Justice is meant to remedy (32). In this juridical atmosphere of the Court, the procedure of advisory opinion, the principle of which is open to dispute, is not sufficient to mitigate its juridical character. This is affirmed, no longer by theoretical commentators, but by the Court itself when, on April 21st, 1923, the Council of the League of Nations submitted to it a request for an opinion on the affair of Eastern Carelia. It replied that it could not give an opinion since " the Court, being a Court of justice, cannot depart from the essential rules

(32) Speech made by M. Weiss at the Institut de Hautes Etudes internationales, 12, place du Panthéon, Paris, as Chairman of the meeting at which M. Demètre Negulesco, Professor of the University of Bucarest, Roumanian delegate to the League of Nations, gave a lecture on the Jurisprudence of the Permanent Court of International Justice.

which guide its activities as a tribunal, *even when giving advisory opnions* " (Publications de la Cour, Séries B, N° 5, *Recueil des avis consultatifs*, p. 29).

Now one of the rules governing the activities of judicial bodies is that they cannot be involved in questions of political or administrative expediency reserved for a competence other than their own.

This essential truth of internal national jurisdictions was bound to be carried over into the domain of the relations between the Permanent Court of International Justice and the Council. " The Court is not a political body ", said Signor Salandra, the Italian representative, before the Council on September 26th, 1923, "and the jurists composing it sit as magistrates." To refer political questions to the Court is " to give the latter a competence which its statutes do not confer upon it" (33). At a later meeting (that of September 27th), Lord Robert Cecil admitted freely that the Court " was not instituted to settle political questions ", and that « to the extent that the political side is at issue " in any problem " the Council remains sole judge in the matter " (34).

This view, the only orthodox one, was taken again, quite recently, in the Sallamis affair, which the Council began to examine at its forty-seventh meeting (September 28th, 1927). We read in the Minutes, reporting the declarations of one of the most eminent members of the Council : " If the Council adopts the practice of asking the Court for an advisory opinion on questions of which the Council is the sole judge, I am afraid that this procedure will damage the prestige of the Council and create the impression that it is incapable of settling such questions on its own authority. "

Thus the principles and precedents are as clear as possible.

Their application to the Roumanian-Hungarian affair, as it came before the Council last September, is no less clear.

From the fact of the Roumanian request based on Article 11, paragraph 2, of the Covenant, from the fact that the Council declared it admissible and examined it thoroughly, the affair of the Hungarian optants of Transylvania has left the judicial plane, that of the Court, and entered upon the political domain of

(33) Minutes of the twenty-sixth Session of the Council, *Official Journal of the League of Nations*, November 1923, p. 1331.
(34) *Ibidem*, p. 1342.

intervention on a basis of conciliation (as a beginning), that of the Council (or the Assembly). Quite legitimately, as we have demonstrated under the second point, the mission of collective mediator has been substituted for that of judge. Without delay — and with all the more haste as the dispute was an old one — this collective mediator set to work to find a solution of expediency. It might have proposed one of pure policy, of simple equity. It preferred to base it on principles which had the approval of a Committee of eminent jurists. This result does not affect in any way either the nature of the procedure or that of the proposals which it produced. Being on the political plane, since entering on its new phase, the dispute is no longer a matter for any but the Council and does not call for an opinion of the Court.

SECOND PROPOSITION. — *The request for the opinion of the Court was impossible, in default of interest.*

A primary rule of procedure in all domains of the law is that the first condition for action is interest. This idea is expressed in the well-known adage : " No interest, no action ", and in that which says : "Interest is the measure of our actions." Moreover this interest must definitely exist without appearing in an exclusively material guise; in numerous cases, moral interest is sufficient as the basis for an action. From the domain of private law, this rule has passed into that of public law; it has there assumed so definite a character that systems of law which, like the French system, accept the submission to a jurisdiction, for cancellation, of acts of the administrative authorities, by action at law, make the exercise of the right of appeal dependent on a direct and personal interest.

This rule is based on considerations of order and social peace. It would be inadmissible if anybody, no matter who, could at any time set in motion the solemn apparatus of justice, without being prompted or authorised to do so by the necessity for defending a right, assailed or menaced. To tolerate the contrary would be to make the judges concur in a task of social disorder, whereas their *raison d'être* is to ensure discipline in the life of the community.

This being so, it seems impossible not to admit the same rule when it is no longer by action at law that a judge is being asked

for the recognition and sanction of a right, but when a given authority is entitled (as in the case of various political organisations) to apply to him for an opinion. If there is not, is *no longer, an interest* behind the request for an opinion, the authority would be guilty both of highly incorrect behaviour towards the magistrates and of an anti-social act, in paralysing their function (when this function is recognised) as judge and as adviser, by submitting idle or futile questions. This point of view is a matter of common sense. In a briefer form no doubt, it is to this that the various constitutions of the American Union refer, which followed the example of the Constitution of Massachusetts of 1870 (still in force), where it says : "Every branch of the legislature, as well as the Governor and the Council, shall have the right to obtain the opinion of the magistrates of the Supreme Court on important questions of law, and on solemn occasions " (quoted by Manley O. Hudson, *The advisory opinions of the Permanent Court of International Justice*, publication of *International Conciliation*, November 1925, N° 214, p. 353). A similar provision is to be found in the Constitutions of the States of New York of 1784, 1792 and 1902, Maine (1820), Colorado (amended in 1886) and South Dakota...

Far from invalidating our opinion that a request for an advisory opinion from the competent judges implies a real and present interest, the provisions alluded to above confirm it. From them it is evident that not only must there be an interest in the opinion being asked, but that this interest, far from being insignificant or of little importance, must be of a serious nature.

Moreover, not only has the point of view set forth above certain remarkable precedents in its favour, but the intrinsic character of the courts called upon to give an opinion must also be taken into consideration. Now when a Court of Justice is called upon to give an opinion, its character of Court of Justice is not outweighed by the special aspect presented by the conclusions to which it comes. So true is this, that in the *Act* passed in 1890, concerning advisory opinions in the Canadian province of Ontario (35) it is stated that " the opinion of the Court shall be considered as an award of the Court ", and that

(35) *Revised statutes of* 1914, c. 85, quoted by Manley O. Hudson. *Ibidem*, p. 359.

against this opinion it will be possible to appeal, as against an award.

No longer in the constitutional sphere, but in that of international institutions — in particular in that of the Permanent Court of International Justice, it was the Court itself which said (as we have already recalled) :

" The Court, being a Court of Justice, cannot depart from the essential rules which guide its activities as a tribunal, *even when giving advisory opinions.* "

The rule : "No interest, no action" is one of the essential rules guiding the activity of tribunals. The Court, the highest of all, cannot, any more than the most humble, depart from this rule, even when called upon to give an opinion. If then the request for an opinion cannot be based, or can no longer be based, on a certain and present interest, the request becomes impossible.

For the foregoing reason, a request for an opinion of the Court was no longer possible in September 1927. To realise this we must, at this point of our argument return to the history of the facts. What does this show? That at bottom the whole Roumanian-Hungarian dispute turns on the following question : the Roumanian thesis asserts that all that Article 250 of the Treaty of Trianon forbids the Roumanian State is to subject the property of Hungarians in Transylvania to measures of liquidation. For the rest, the Treaty of Trianon cannot and could not establish any kind of preferential treatment in favour of the Hungarian optants; on the same conditions as the Roumanian owners, and like them, the Hungarian optants can be expropriated for reasons of public welfare, and *a fortiori* for reasons of public necessity. To which the Hungarian argument (which it is hoped will prevail if the competence of the Mixed Arbitral Tribunal is relied on) replies by demanding, in favour of the optants, a veritable privilege of immunity from the application of the agrarian law (see de Lapradelle, *Opinion concerning the agrarian affairs of the Hungarian nationals*, Competence, p. 20, second proposition). " In transferred territory, the nationals of the dismembered State cannot individually, and less still *en masse*, be deprived of the right to retain their property in kind. " In which contention the Hungarian Government loses sight of the fact, which is nevertheless of paramount importance, that by an official letter

to the Peace Conference, Count Apponyi himself demanded, as the maximum which could be granted to him, the equality of Hungarian nationals with Roumanian nationals (36). Now this equality was strictly recognised by the three points which the Committee of the Council, on the report of the six, induced the Council to set down as suggestions for an agreement between Roumania and Hungary. In these circumstances any interest vanished which might otherwise have existed in the Court's being aked for an advisory opinion on the abstract value of these principles; for this second reason, in September 1927, the Council was debarred from asking the Court for an advisory opinion.

THIRD PROPOSITION. — *Supposing that the foregoing reasons had not rendered impossible a request for the opinion of the Court, the Council could only have asked for this opinion with the unanimous consent,* a) *of the members of the Council,* b) *of the parties to the dispute represented on the Council, in virtue of Article 4, paragraph 5, of the Covenant.*

A. — As the Covenant and the Statutes of the Court are silent on this point, it has been debated whether the Council could ask for the opinion of the Court by a simple majority or whether it has to decide unanimously.

Those in favour of decision by a simple majority (Baker, *Jurisdiction of the Permanent Court,* British Year Book of international Law, 1925, p. 75, followed by a young Polish author, Gonsiorowski, Société des Nations et problèmes de la Paix, Volume 2, p. 473) contest the necessity for a unanimous decision, alleging first of all a fundamental distinction between the decision, the verdict of the Court and the opinion of the Court. Under B we shall see that this view is mistaken in that it confines itself to the terms of abstract law and does not take into account the actual bearing of the Court's advisory opinion. Moreover, these authors think that they can support their point

(36) "We ask for a reassuring statement to the effect that no property belonging to our nationals on the territory of the former Austro-Hungarian Monarchy shall be sequestrated, liquidated or expropriated by virtue of a legal provision or by means of a special measure *which does not apply, in the same conditions, to the subjects of the liquidating State or of the State putting such a measure into force.*"

of view by two other kinds of consideration, neither of which is conclusive.

1) A request for an opinion constitutes, so they say, one of those questions of procedure which, under Article 5, paragraph 2, of the Covenant are decided by a majority of the Members of the League represented at the meeting. It will be admitted that to reduce the request for the opinion of the Court to a simple question of procedure is not easy to reconcile with the prestige which surrounds this supreme tribunal ; what is more serious is that to assimilate unrestrictedly the request for an opinion to a question of procedure is quite erroneous. The request for an opinion may be a question of procedure, but in other and far more frequent circumstances it will not be one. In point of fact it has never been one since the Court began to give opinions. How then is it to be decided whether the request by the Council for an opinion of the Court constitutes or does not constitute a question of procedure? By dwelling on *the intrinsic nature* of the point or of the dispute to be submitted to the Court for an opinion. If the content of the problem to be submitted to the Court brings into play the rules intended to ensure the order, discipline and good working of the deliberations of the Assembly or the Council (Article 5, paragraph 2, of the Covenant), the question submitted for an opinion will be a question of procedure and the request for an opinion may be decided by a simple majority; but if the content of the point or of the dispute to be submitted to the Court for an opinion is concerned with the substance of the law, that is with the legal principles which determine rights and duties, the question is no longer one of procedure; to decide that the opinion of the Court must be obtained in this matter, the Council, bound by the general principles of Article 5, paragraph 1, of the Covenant, will have to decide unanimously to have recourse to the Court.

2) Those in favour of requesting an opinion on a simple majority vote, alarmed at the extreme precariousness of their original position, quickly fell back on other ground. Remembering that the Council appoints, on a simple majority vote, *committees of jurists*, which come within the definition of Article 5, paragraph 2, of the Covenant, they apply, arbitrarily and by extension, the principle of a majority decision to the

resolution by which the Council asks for the opinion of the Court (see Baker, *loc. cit.*, p. 75). In so doing, their point of departure is the idea that the Council is pursuing the same end (that of obtaining information) when it appoints a special Committee of Jurists and when it decides to ask for the opinion of the Court (see Baker, *loc. cit.*, p. 75); after which, from the identity of the ends pursued by two different procedures, they deduce the identity of the juridical régime (majority régime) to which the decision must be submitted which brings into play one or the other régime. They forget that the identity of juridical regimes is based on the identity of juridical *natures* and not on the identity of *aims*. New to set up an entirely new organ (a committee of jurists) in order to obtain its opinion and to decide to ask the opinion of a Court already in existence are two operations quite distinct in nature, since into the former (which is entirely creative) there enters a factor which does not appear in the second : the designation of a certain number of persons to be chosen by vote.

Our conclusion under A is, therefore, that no valid reason exists why the Council, in the matter of asking the opinion of the Court, should be allowed to set aside the general rule for its deliberations, which, except where otherwise expressly provided in the Covenant, is that of " the agreement of all the members of the League represented at the Meeting (Article 5, paragraph 1) ".

Great authorities on legal doctrine have not hesitated to adopt this view. This is the case with Mac Nair in his article (*An advisory opinion*) in the British Year Book of International Law, 1926, pp. 1-13, and Oppenheim in the fourth edition of the *Traité de Droit international* (Volume II, p. 55) : " Except where the Council merely seeks an opinion on a question which is itself one of procedure, its decision to make a request is not a matter of procedure, and requires absolute unanimity of the members of the Council present at the meeting, including, if present, as they are entitled to be, the representatives of the disputants. "

This point of view is also shared by another high authority on international law, M. Raoul Fernandès, Brazilian Ambassador to Belgium, and Delegate to the League of Nations.

In a lecture given at the University of Brussels on January 11th, 1927, the illustrious Brazilian jurist said :

"It would be quite inadmissible to assimilate the request for an opinion of the Court to a decision relating to investigation or expert advice; the League of Nations will give any value it pleases to the conclusions of a Committee of inquiry or to those of experts, whereas it can only bow to the opinion of the Court. To have recourse to the latter is not an expedient of procedure but a declining of competence. It is thus entirely in conformity with Article 5 of the Covenant for the resolution to be taken unanimously." (37).

B. — The unanimity mentioned above is *absolute unanimity* : by which is meant : unanimity which includes even the votes of the representatives of the disputants, assuming that they exercise the rights conferred on them by Article 4, paragraph 5, of the Covenant (which is the case in the present phase of the Roumanian-Hungarian dispute).

This principle is the only one admissible if the real bearing of the opinions of the Court is to be kept in sight. Doubtless the opinions of the Court are not, in theory, binding on the Council, but the persuasive force of these opinions is so great that, in practice, the Council never ignores their conclusions.

This character of an indirect award, possessed by the opinions of the Court, has been noted more than once. In his book already quoted several times (*La Justice Internationale*, p. 173), M. Politis, when speaking of the legal opinions of the Court on a dispute already in existence, did not hesitate to express his view thus : " (The Court) is asked to give an opinion which is, indirectly, an award. " M. Travers is equally definite (*La Cour Permanente de Justice International*, in the *Revue Générale de Droit International Public*, 1925, p. 44) : " in pont of fact, the Council cannot fail to adopt the opinion of the Court " — " If it were to depart from it, it would appear to be violating the rules of law and, at the same time, it would be assailing the moral authority of the Court " — Another author who has consecrated an exhaustive article to the organisation and competence of the Court, Fachiri (*The Permanent Court of International Justice*, 1925, p. 135) observes that " the advisory competence of the

(37) Raoul Fernandes : *Les Etats-Unis et la Cour Permanente de Justice Internationale*, Brussels, 1927. Publisher : René van Sulper.

Court offers, in cases of a juridical character, an indirect means of access to the Court which, in practice, may be utilised as a substitute for directly obligatory jurisdiction." This is not all pure theory. That "the independence" of the Council " would in some degree be annihilated " when the Court had given an opinion, was admitted twice over of his own free will by the Italian representative on the Council of the League of Nations in 1923, at the Meeting of September 27th (38). There is nothing astonishing in this ; the contrary would result in the destruction of the Court's authority.

And let the Council but suggest, as it did in 1927 (see Meeting of September 19th, 1927, at 11. a. m. Doc. C/47th Session. Minutes 3, p. 2) when the matter was laid before it in virtue of Article 11, that it could take sanctions against the parties who did not fall in with suggestions obtained from the Court in the form of an advisory opinion, and it is still easier to understand the idea expressed by Fachiri that " in cases of a juridical character " the advisory competence of the Court is merely an indirect means of access to its obligatory jurisdiction. In these conditions, what becomes of the principle whereby a jurisdiction is obligatory only for the States which have accepted it? If this principle must be safeguarded, and it must, otherwise a certain violence would be done to the States who had not signed the optional clause of Article 36, paragraph 2 of the Statutes of the Court, there is no choice but to agree that the opinion of the Court can only be asked for by absolute unanimity of those present at the Council (or Assembly), including the representatives of the parties to the dispute.

In applying these principles to the happenings before the Council in September 1927, we shall affirm that, if it had been possible, the request for an advisory opinion of the Court. ought to have been made by a unanimous vote of the members of the Council, including the Hungarian and Roumanian representatives.

(38) See Minutes of the 26th Meeting of the Council, *Official Journal of the League of Nations*. N. Nov. 1923, pp. 1339 and 1342 : "I admit that the opinion of the Court would have great weight ; so much weight that it would be difficult for us to hold a different opinion."

The Roumano-Hungarian dispute concerning the Hungarian optants in Roumania territory(*)

BY

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A.— *THE FACTS*

a) With a view to remedying difficulties of a social order, Roumania instituted, in 1913, an agrarian policy the object of which was to convert large landed estates situated in Roumanian territory into small holdings. This policy was pursued after Roumania's entry into the world war. On March 22nd, 1927, the King promised that immovable property would be transferred to soldiers by means of measures similar to those which had, in general, been proposed in 1913. A clause in accordance with the tenor of the agrarian legislation was inserted in the Constitution of 1917, voted by the Constituent Assembly elected in 1914, and sitting, in 1917, at Jassy, with the expressly declared object of introducing the principle of expropriation in the general interest. After the declaration of Peace, the Roumanian Government was forced to take steps particularly against the possibility of measures of a subversive nature (it must not be forgotten

(*) Translated from the French version.

that Roumania's neighbour was Russia, where private ownership had been abolished by dividing estates among the people); it voted two laws, one on July 17th, 1921, which applied to the old Kingdom, and the other on July 30th, 1921, the object of which was expropriation of landed property in the newly acquired territories; both of these laws were based on the amendment introduced in the Constitution of 1917 (2) and provided for the expropriation of estates exceeding a given area, against pecuniary compensation. These laws made no discrimination between Roumanian nationals and the nationals of other States — particularly of Hungary.

b) Landowners domiciled in Roumanian territory but who, in accordance with the Peace Treaty of Trianon, had opted for their mother-country, Hungary, then protested against the application of the Roumanian agrarian laws, particularly on the grounds that the sums to be paid in compensation would not, especially with the depreciation of the Roumanian currency, represent the equitable compensation which, in their opinion — supported by their Government—was due to them in conformity with the recognised principles of international law in force After submitting an application to the Conference of Ambassadors, which was rejected for reasons of jurisdiction, Hungary, relying on Article 11 of the Covenant of the League of Nations, appealed to the Council of that body requesting it to examine the *substance of the question*, to declare that the measures introduced by Roumania were contrary to the provisions of Article 250 of the Treaty of Trianon and to order the restitution of the land and other property expropriated; finally, to order that full compensation be paid for the damage suffered by the Hungarian optants in Roumania. Negotiations opened in 1923 in Brussels under the chairmanship of M. Adatci, appointed by the Council for that purpose, having failed, certain Hungarian nationals who had suffered damage as a result of the Roumanian measures lodged a complaint with the Roumano-Hungarian Mixed Arbitral Tribunal (3) set up under Articles 239 and 250 of the Peace Treaty of Trianon, claiming that the measures imposed on Hungarian nationals domiciled in Roumanian territory constituted acts contrary to Article 250 of the Treaty of Trianon which precluded all liquidation in regard to those nation-

(2) See the *Official Journal of the League of Nations*, 1923, p. 730.
(3) Hereinafter called the M.A.T.

als. Consequently, they demanded that their land be restored to them or that fair pecuniary compensation be paid to them.

Roumania, on the other hand, in 1925, argued before the M. A. T. that this Tribunal was not competent to deal with the matter since, according to the terms of the Treaty of Trianon, it could hear and determine only those questions mentioned in those provisions, which did not provide for situations of the nature of that which had arisen from the measures forming the subject of the dispute.

On January 10th, 1927 the M. A. T. declared itself competent (against the vote of the Roumanian arbitrator, who expressed a dissenting opinion) and cited in support of its decision Article 250, paragraph 3, of the Treaty of Trianon; thereupon Roumania, by a note dated Febuary 24th, withdrew her judge and refused to allow him to sit on the Tribunal for the 22 cases affected by the decision of January 10th, if, as was the intention of the Tribunal, the substance of the cases was discussed. At the same time, Roumania laid the matter before the Council of the League of Nations in virtue of Article 11, paragraph 2, of the Covenant (4). Hungary replied on March 7th, 1927, by requesting the Council to appoint two arbitrators, to be chosen from nationals of Powers which had remained neutral during the world war, in accordance with Article 239 of the Treaty of Trianon, in order that the M. A. T. might continue to function (5).

The British representative having been asked to study the question and to report at the next session of the Council and having asked that the representatives of Chili and Japan be appointed to act with him, the Committee so formed, known as the Committee of Three, which could not forget that the matter had originally been submitted to the Council not under Article 239 of the Treaty of Trianon but under Article 11 of the Covenant, and that its intervention had been asked for, first of all by Roumania and then by Hungary, considered that it could not evade the duty imposed on it by the Covenant and confine itself simply to the election of two deputy members for the M.A.T. which the Hungarian representative had

(4) *Official Journal of the League*, 1927, p. 350 ff.

(5) *Official Journal of the League*, 1927, p. 370 ; the case of the Agrarian reform in Roumania and the Hungarian optants in Transylvania before the League of Nations, 1927, p. 71.

as a result of the proceedings demanded. If it did so, it would have failed to discharge its political duties as a *mediator* and *conciliator* (6) in the dispute which extended far beyond the actual terms in which it had been originally submitted by the two parties. Considering therefore that it could not take a purely and strictly legal view of the Council's duties, especially as it realised that the election of the two deputy members would not have finally ended the difference (7), the Committee attempted to reach a solution which would have led to better feelings. No understanding having been reached owing to the failure to obtain the consent of the parties in dispute, the Committee, after having consulted eminent legal authorities (8) and having minutely examined the question of the M.A.T.'s jurisdiction, formulated the three following principles:

1) *The provisions of the peace settlement effected after the war of 1914-1918 do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.*

2) *There must be no inequality between Roumanians and Hungarians, either in the terms of the agrarian law or in the way in which it is enforced.*

3) *The words "retention and liquidation" mentioned in Article 250, which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territories and in so far as such owner is a Hungarian national.*

Commenting on these three principales, the Committee declared:

In regard to N° 1 : "Article 250 forbids the application of Article 232 to the property of Hungarian nationals in the transferred territory. Under the terms of Article 250, the prohibition to retain and liquidate cannot restrict Roumania's freedom of action beyond what it would have been if Articles 232 and 250 had not existed. Even if none of these provisions appeared in the Treaty, Roumania would none the less be entitled to enact any agrarian law she might consider suitable for the require-

(6) The italics are the author's.
(7) Report of Sir Austen Chamberlain, 47th session of the Council, meeting of Sept 17th, 1927, document C. 47th session Minutes I, page 4.
(8) Report C. c. p. 5.

ments of her people, subject to the obligations resulting from the rules of international law. There is, however, no rule of international law exempting Hungarian nationals from a general scheme of agrarian reform.

"The question of compensation, whatever its importance from other points of view, does not here come under consideration. "

In regard to N° 2 : "Any provision in a general scheme of agrarian reform which either expressly or by necessary implication singled out Hungarians for more onerous treatment than that accorded to Roumanians, or to the nationals of other States generally, would create a presumption that it was intended to disguise a retention or liquidation of the property of Hungarian nationals *as such* in violation of Article 250 and would entitle the Mixed Arbitral Tribunal to give relief. The same would apply in the case of a discriminatory application of the Agrarian Law. "

In regard to N° 3: " The right which the Allied Powers reserved to themselves under Article 232 to retain and liquidate Hungarian property within their territory at the time of the entry into force of the Treaty applies to the property of a Hungarian inasmuch as he is a national of an ex-enemy country. It is not sufficient that these measures entail the retention of Hungarian property by the Government and that the owner of this property is a Hungarian. The measure must be one which would not have been enacted or which would not have been applied as it was if the owner of the property were not a Hungarian. "

With these principles in mind, the Committee suggested that the Council should request: 1) the Parties to conform to the three principles; 2) Roumania to reinstate her judge on the M.A.T.

The Council did not accept this second suggestion nor did it appoint any deputy judges in accordance with the proposal made by the Hungarian Delegation; the latter had also suggested to Roumania that terms of submission should be prepared, submitting the question of a possible exceeding of powers by the Roumano-Hungarian M.A.T. to the permenent Court of International Justice; this proposal was rejected by Roumania (9).

Acting in virtue of Article 11, paragraph 2, of the Covenant, and without taking into account the decision taken by the

(9) See Doc. C. I. c., p. 7.

M.A.T. on January 10th, the Council prefered to confine itself to asking the two parties to accept the three theses set forth by the Committee, without requesting The Hague Court of Justice for an advisory opinion, also requested by Herr Stresemann.

B. — LAW.

I

The procedure followed or proposed for the purpose of settling the dispute.

a) The Proceedings before the Roumano-Hungarian M. A. T.

1) IN DECLARING ITSELF COMPETENT, DID THE ROUMANO-HUNGARIAN ARBITRAL TRIBUNAL EXCEED THE LIMITS OF ITS JURISDICTION ? IF SO, WHAT WOULD BE THE CONSEQUENCES OF THIS EXCEEDING OF POWERS?

aa) General considerations.

One of the consequences of the juridical character of any arbitral authority is that arbitral tribunals, which limit the sovereign powers of States and owe their *raison d'être* and juridical existence to the will of those States, *have no rights other than those expressly and definitely conferred upon them.*

The principle: *exceptiones sunt strictissimæ interpretationis,* must here be admitted with all its resulting consequences (10).

It follows that, if the Arbitral Tribunal did not scrupulously observe the limits laid down for it, or if it deals with a question outside its jurisdiction, *nothing has been done, nihil actum est;* there is no decision and the injured party *has no need to ressort to juridical measures with a view to the cancellation of the* so-called *award* (11).

When from the juridical point of view nothing has been

(10) ALVAREZ : *l'Europe Nouvelle* of 29.10.27, p. 1453. STRUPP : *Die Zuständigkeit der gemischten Schiedsgerichte des Versailler Friedensvertrags*, 1923, p. 3 and the writers quoted in Note 4 of this latter work.

(11) If, in cases of this kind, the parties have frequently resolved to refer to another arbitral tribunal, which has dealt with this question of an exceeding of powers, it was, in my opinion merely a precautionary measure of psychological importance taken for the purpose of allaying public opinion ; from the juridical point of view such a step was unnecessary ; an award *merely establishes a fact (simply declaratory in its effect).*

accomplished, there can be no reaction against an act which is juridical non-existent (12).

But if this is — in my opinion — incontestable, it does not follow that every interpretation, *even objectively false*, given by a certain arbitral tribunal to the clauses defining its jurisdiction, constitutes in itself an excess of powers. It is universally agreed that an arbitral tribunal can declare or refuse to acknowledge its competence, in a *preliminary* decision (13).

There is an excess of powers if, in interpreting the text of terms of submission, on which its jurisdiction is based, it proceed *ultra petita partium;* if for example, it pronounces on a question the solution of which, although of interest for the concrete case, has not been requested by either of the parties; if it awards damages when none have been claimed, confining itself perhaps to the *statement* of an international offence, etc.

But this question should not be confused with the other, in which the arbitrators in declaring themselves competent, for example, reached that conclusion through *considerations* which are the expression of their judicial convictions, without any refusal of justice. *It is therefore a question of interpretation of the decision itself and especially of the effect of that decision.*

The note relating to the case of the U. S. and Paraguay Navigation C° (14) very rightly expresses the following opinion : "The arbitrator's right to interpret the terms of submission is admissible only in so far as they exercise that right in a reasonable manner ; if the controversy is distorted from its true sense through an abusive interpretation, the award becomes voidable

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(12) See, with the numerous references, based on international practice and doctrine : STRUPP, *Die Zuständigkeit der gemischten Schiedsgerichte in ihrem ganzen Umfang*, pp. 57-64 ; and LAPRADELLE-POLITIS, *Recueil des arbitrages internationaux*, II, 1924, pp. 51, 420 ; LAMMASCH, *Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange*, 1913, p. 217.

(13) See LAMMASCH, I. c., 166 ; LAPRADELLE-POLITIS, II, 51 (doctrinal note), I, 105 ("who rightly say that any other view would lead to the conclusion that, whenever a plea of incompetence was submitted, the arbitrator would be obliged to admit it"

See also : MEURER, *Friedensrecht der Hager Konferenzen* 1905, p. 330, ROLIN JACQUEMYNS in the *Revue de Droit international et de Législation comparée* (referred to as R. D. I. C.), IV, 139.

FAUCHILLE, *Traité de Droit int. public* I, Part 3, 1926, p. 548 ; *Annuaire de l'Institut*, I, 126. — See also Art. 73 of the Convention of 1907 on the amicable settlement of international disputes ; Art. 36, IV of the Statutes of the Court of International Justice.

See also LAUTERPACHT, *Private law sources and analogies of international law*, 1927, p. 208.

(14) See LAPRADELLE-POLITIS, II, 51.

on the grounds of an excess of powers and the parties are free to disregard it. " (15).

But " for an arbitral award to be invalidated, *it is not sufficient that the interpretation of the terms of submission to arbitration be doubtful or even contestable; if this were so, arbitration would too often be a parody of justice,* for if there were the slightest ambiguity in the terms of submission, the unsuccessful plaintiff would be given too easy a pretext for evading the award on the ground that the interpretation given was *erroneous.* " (16)

bb) *What are the conclusions to be drawn from the foregoing, in so far as concerns the present case ?*

1) Although neither the Treaty of Trianon nor the rules of procedure laid down by the arbitrators on July 10th, 1922 (17) contain any specific clause on this point, there is no doubt that the M. A. T. has the right to interpret the norms governing its jurisdiction. (See paragraph as above).

If therefore Roumania pleaded the incompetence of the M. A. T., it was the duty and right of the latter to examine the rule on which its competence is based. In a dispute which showed, *in so far as the question of competence only was concerned,* certain points of similarity with the case here under examination, the Court of International Justice at The Hague expressed the following opinion :

" The Court should, first of all, examine whether Article 23 of the Geneva Convention (determining the jurisdiction of the Court) confers upon it the right to hear and determine the dispute submitted to it, and, in particular, whether the provisions to be referred to in pronouncing upon the application are included among those regarding which the jurisdiction of the Court is established," (18) and as a result of its enquiry, the Court reached — l. c. — the following conclusions, which have the same value in the present controversy :

(15) The italics are the author's.

(16) The italics are the author's. See also resolution No, 9 (26.7.27) of the Court of Justice, P. 32. It is true that jurisdiction is limited since it exists only to the extent recognised by the Powers; consequently, in the event of contestation, the Court can declare itself competent *only on condition that the weight of the reasons militating in favour of such competence is absolutely convincing.* See also RALSTON, Law and procedure of international law, 1926, p. 51.

(17) See the Decision of the Mixed Arbitral Tribunals, II, 1923, p. 826 ff.

(18) See Publications of the Arbitral Court, N° 6, p. 15.

" In view of the decision which it is here asked to take, the Court *thinks it should examine the above questions even if such an examination obliges it to touch upon matters connected with the substance of the question, on the understanding, however, that nothing contained in the present award shall restrict its complete freedom of judgment in discussions of the substance of any arguments which may in future be advanced by one or other of the parties in connection with the same questions.*" (19). In the present case, Article 250 of the Treaty is the *sedes materiæ*. It is worded as follows :

"Notwithstanding the provisions of Article 232 and the Annex to Section IV the property, rights and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions.

"Such property, rights and interests shall be restored to their owners freed from any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration, taken since November 3, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measures in question.

"Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239."

2) Before taking up the question of substance, the Roumano-Hungarian M. A. T., to which Roumania submitted her plea of incompetence, was therefore obliged to pronounce on the question whether the measures which Hungary claimed to be measures of "retention and liquidation" in the meaning of Article 250, paragraph 1, were really of that nature from the juridical point of view; for it was only in the case of *such* "retention or liquidation" imposed on persons mentioned in this first paragraph, that the Tribunal's competence was justified. In proceeding to this examination, the two judges, representing the majority of the M. A. T., without taking into account the external aspect of the measures adopted, had to ascertain whether, from the nature of the measures taken and from the con-

(19) Author's italics.

ception of Article 250, they could fall to be dealt with under that Article. Now, what were the considerations which led the M. A. T. to declare itself competent in the present dispute?

It is true that the M. A. T. bases its argument on the fact that "in inserting Article 250 in the Treaty of Trianon, the intention of the Allied and Associated Powers was *fully* to protect the property, rights and interests of Hungarian nationals, situated within the territory of the former Austro-Hungarian Monarchy, from all the measures, mentioned in Article 232 and the Annexe thereto, Section IV, as well as in Article 250 itself, and to place these properties, rights and interests under the régime of common international law.

"Whereas, in order properly to judge of the question of the competence of the Tribunal it must above all be ascertained whether or not the measures here objected to have the characteristics of one or other of the measures which in the terms of Article 250 can give rise to claims that can be laid before the Mixed Arbitral Tribunal; and whereas if the Tribunal finds that such is the case it is furnished with elements sufficient to establish its competence, but it is only after examining the substance of the claim that the Tribunal will be in a position to judge whether the circumstances of the case are really of a nature to justify the application of Article 250; and whereas the statement made by the defendant to the effect that these measures were taken in execution of the agrarian reform law in Transylvania, the Banat, Crishana and Maramures, has no bearing on the question of competence; and whereas it is only in the event of the Tribunal declaring itself competent that the defendant can, in submitting his arguments as to the substance of the matter, state his reasons based on agrarian reform legislation, or any other reasons of substance he may wish to advance to prove that Article 250 should not operate in this case; an whereas the (other) facts advanced by the applicant are sufficient to show that, in this case, it is a question of a measure affecting the ownership of ex-enemy property in that it was taken away in its entirety from the owner and without his consent; that this measure constitutes a violation of the general principle of the respect of acquired rights and oversteps the limits of common international law and that it is quite in the nature of a liquidation in the meaning of Article 250 and consequently falls to be included among the measures referred to in that article; whereas

the defendant claims that the measure referred to in Article 250 under the name of "liquidation" is a war measure taken for war purposes, the most characteristic feature of which is that it affects ex-enemy property "as such" and that the expropriations arising out of the agrarian reform do not, by their very nature, constitute liquidation since they are in no manner whatsoever differential measures and, in any event, are not measures taken for war purposes; that they are therefore in no way incompatible with Article 250; whereas it emerges clearly from the provisions of Articles 232 and 250 and from paragraph 3 of the Annex, Section IV, that the liquidation in the meaning of Article 250 can be either war liquidation or post-war liquidation, that the meaning of either of these operations is the same and that they differ only in their object; that, in both cases, it is a question of subjecting ex-enemy property, rights or interests to a treatment which constitutes a derogation to the rules generally applied in so far as concerns the treatment of foreigners and to the principle of the respect of acquired rights... "

For these reasons, and without attaching any importance to the above-mentioned negotiations at Brussels, when the Hungarian delegate, who was later disowned by his Minister, did not contest — and this is confirmed by the minutes of these negotiations — that the Treaty of Trianon did not preclude the expropriation of property belonging to optants for reasons of public welfare, the M. A. T. declared itself competent (20).

This declaration of competence does not seem satisfactory. While conforming to the terms of Award N° 7 given by the Court of Justice in what was, moreover, too "*slavish*" a manner, — if the expression be permissible — it did not "touch upon" the substance of the question in its considerations. It did not penetrate into the heart of the matter; otherwise it would have seen that *expropriation, in the meaning of the agrarian law, and liquidation, in the meaning of Article 250, are two operations of an entirely different nature.* In law, as it stands at present, it is true that a mediocre decision cannot be regarded as an entireless valueless decision! Otherwise, a great number of awards given by international and arbitral courts would be annulled; a glance at the great works of *Lafon-*

(20) See the text of the decision : *Revue générale du droit international public*, 3rd series, I, 1927, p. 1419 ; see further : *Recueil de la jurisprudence des Tribunaux arbitraux mixtes créés par les traités de paix*, IV, 1927, p. 424 ff.

taine and *Lapradelle-Politis* will show that this point is fully proved. Now, the M. A. Tribunals created by the Peace Treaties have taken more than one decision which, in this case, would rightly deserve to be cancelled. That, however, is not the opinion held by the creators of the international arbitral tribunals, that is to say, the Powers. They realise that even an unsatisfactory decision by an international court may *eventually*, particularly *in a question of minor importance*, serve to allay public opinion, and, in this respect, act as a means of assuring peaceful conditions. These considerations, however, cease to be conclusive in questions such as the Roumanian-Hungarian dispute. *In this case, vital interests are at stake.* Even if there has been no excess of authority but only too narrow an interpretation of competence by the M. A. T., Roumania will have no confidence in any future decision taken by a tribunal which has settled the preliminary question, although subjectively and undesignedly, in such an unsatisfactory manner from the juridical point of view. The three principles laid down by the Committee, — *and they are really juridical* — show the result that would have been attained by a higher and less narrow interpretation by the M. A. T. The Committee should, in particular, have declared that the provisions of the agrarian law could well be reconcilied with Article 250, instead of saying that this had no relation to the question of competence; it should not have confined itself to the curt and simple statement that, since the measures taken affected the ex-enemies in Roumanian territory, that was sufficient to justify its competence. Absolute formalism in juridical matters is never successful; there are cases — and the decision of the *Court of Justice* prove this — in which it is possible with the aid of subtle juridical psychology and a few words to win the absolute confidence of the two parties in dispute.

All who are acquainted with my articles, particularly on the subject of international arbitration, know that I am an ardent advocate of the principle of arbitration, which I regard as the greatest forward step and the grandest conception of our time, to use the description applied by the much regretted *F. de Martens*, and (although I have on more than one occasion held a different opinion) I have the profoundest respect for the judgments and advisory opinions of the International Court at The Hague, but there are certain decisions of the arbitral tribunals

which furnish, from the psychological standpoint, ample explanation of the hesitation on the part of certain States to avail themselves of this means of averting war. There is another point of view : the possibility of losing its case should not, of course, lead a State to repudiate this noble institution. There are, however, some instances — and this is fully proved by the present question — where the wisdom of the drafters of the Covenant of the League of Nations calls for praise, in that the States are not compelled to refer all their disputes to arbitration or to an international authority but have at their disposal other organisations for the amicable settlement of a dispute. Although reference to arbitration or to an international jurisdiction is the method *par excellence* of settling disputes which are purely or chiefly of a juridical nature, mediation by the Council is the most suitable method, provided that the dispute has or assumes (as in the present case) the aspect of a political controversy. Let us not be too inflexible and say that it would be compromising the cause of arbitration to submit a case pending before, or settled by, an arbitral tribunal, to the League of Nations. Such a statement would have been justified in the past when this body was not yet in existence or was functioning only very imperfectly. Now that it does exist, it cannot de denied that it is preferable to reach a satisfactory amicable settlement than to see one of the parties dissatisfied and reluctantly accepting a decision with it regards as unfair and which gives rises to a more or less marked feeling of animosity against the opponent who has won the case before the arbitral tribunal.

It was therefore with every justification and with really friendly intention that Roumania, rightly dissatisfied with the decision of the M. A. T. — and remembering the resolution voted by the Council in 1923, whereby the two Governments were invited to do their utmost to prevent the question of Hungarian optants from becoming a disturbing influence in the relations between the neighbouring two countries (21) — appealed to the League of Nations on the basis of Article 11, paragraph 2 of the Covenant, calling its attention to a circumstance which threatened to disturb international peace.

Hungary, on the other hand, who had applied to the same authority in 1923, requested the appointment of judges for the

(21) See *Official Journal of the League of Nations*, 1923, p. 886 ff., and Annex 53, p. 1009.

M. A. T. to replace the Roumanian arbitrator, in order that the Tribunal might be in a position to settle the substance of the dispute. The events which followed have been set forth in the first part of this opinion. It only remains to examine them from the juridical standpoint.

2) The first question to be settled may be summarised as follows :

" *Can the Council, appealed to under Article* 11 *of the Covenant and Article* 239 *of the Treaty of Trianon, refuse to appoint an arbitror?*

a) Assuming — as will be proved in b) — that Article 11 confers upon the Council of the League of Nations unlimited right to find a solution to the dispute submitted to it, does this right, derived from the Covenant of the League of Nations, which forms the first part of all the great Peace Treaties of 1919-1920, the Treaty of Trianon included, come into conflict (according to the well-known expression: " *lex specialis derogat legi generali* ") with Article 239 of the Peace Treaty with Hungary? Does this latter Article preclude the League of Nations from acting as it deems fit, that is, from *refraining, for political reasons, from appointing an arbitrator* indispensable to the question? In my opinion, the answer is in the *negative*. Although Article 239 *entitles* the Council *to appoint an arbitrator, in the event of a vacancy, it cannot oblige it to make this appointment*.

In so far as the League of Nations, acting under international law, is concerned, *a treaty in force between other parties* — in this case, the Treaty of Trianon — is *res inter alios acta* (for neither the League nor any one of its Members is identical with the signatories of the Treaty of Trianon, although the latter *also accepted the* Covenant embodied in that instrument).

The League of Nations, or, in this case, its competent organ : the Council, *is absolutely free to decide whether it shall accept the offer* (for it is no more than an offer) which that Treaty makes regarding the appointment of arbitrators or whether it shall reject it.

It is given the option and nothing more.

And even if the Council appoints an arbitrator, in a given instance, it can for political reasons and in accordance with Article 11 *of the Covenant, refuse to do so in another instance.* The Hungarian Delegate was therefore wrong when he made the

following statement before the Council on September 17th, 1927 (22) :

"We do not ask a favour for ourselves. We have merely stated before the Council that this is an absolute obligation imposed by the Treaty. "

This view entirely overlooks that *res inter alios acta tertio nec prodest nec nocet* (23). In the third edition of his masterly work (24) entitled : " *Corso di diretto internazionale* ", M. Anzilotti, judge at the International Court of Justice, writes as follows : "*I trattati internazionali non sono obbligatori che per le parti contraenti :* OBLIGATIO TERTIO NON CONTRAHITUR. *Rispetto ai terzi, i trattati sono* UNA RES INTER ALIOS ACTA, *da cui non possono ad essi derivare nè diritti nè obblighi. Pochi principi di dirito internazionale sono al par di questo sicuri e universalmente riconosciuti.* " A Treaty is legally binding only on the States signatory thereto, " *cosi la Corte permanente di giustizia internazionale nella senteza n° 7, del 25 maggio 1926 (Publications, cit. Series A, No. 7, page 29).* "

There are, moreover, a fairly considerable number of clauses to be found in the Peace Treaties which grant such competence (and its accompanying burden is imposed in certain cases) either to the League of Nations or to other States. In this connection, reference may be made to the clauses which entitle certain States to a seat on international commissions. (To quote a few examples only, see Articles 340, 341, 347 of the Treaty of Versailles.)

Reference may also be made to the famous Article 213 of the Treaty of Versailles, on the disarmament of Germany, conferring certain rights of supervision upon the Council of the League of Nations.

3) It is well that the Council of the League of Nations is not bound by the existence of Article 239, for such an obligation to appoint arbitrators would not be in harmony with the position which it occupies in virtue of the Covenant. The ingenious principle conceived in the Covenant is that which created a juridical bond between the Members of the League of Nations in virtue of which they submit their disputes to arbitral or ju-

(22) Doc. C, 47th Session, Minutes I, p. 5.
(23) See STRUPP : *Eléments du Droit international public universel européen et américain*, 1927, p. 186 X.
(24) 1928, p. 369.

dicial authorities or to a body which is primarily of a political character (25) such as the Council; this is a logical consequence of the development of international judicial institutions created to avoid war, of the principle of arbitration, mediation and conciliation contained in the Bryan treaties and in the treaties signed by the United States in 1913 (26).

And as *M. Alvarez* has so clearly explained : "the criteria which guide it are not of a juridical nature, the latter being frequently based on abstract logic or pervaded by the idea of absolute justice. It is especially and primarily inspired by political criteria, which take into consideration all the aspects of a question, particularly the economic, social and politic aspects. In short, it follows the principle of social justice. It concentrates on the general interests of peace, interests which take precedence over all other considerations, and to attain that objective it can even depart from juridical rules if it deems proper to do so." See also the brilliant declaration made by *M. Titulesco* at the session of the Council of September 17th, 1927 (27).

Article 11 of the Covenant (28), which is perhaps the most important principle of this fundamental law of the League of Nations, is in perfect harmony with the general ideas just set forth; the text of this Article is as follows : "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations."

In case any such emergency should arise, the Secretary General, on the request of any of the Members of the League forthwith summons a meeting of the Council (29).

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(25) Rousseau : *La Compétence de la S. d. N.*, 1927, p. 19 ; Gonsiorowski, II, 326 ff.

(26) See Strupp : *Eléments*, p. 239 ff. ; Gralinski : *Le règlement pacifique obligatoire des différends internationaux, suivant le pacte de la S. d. N.*, 1925, 33 ; Gonsiorowski : *La Société des Nations et le problème de la paix*, 1927, II, 323.

(27) *L'Europe Nouvelle*, 1927, p. 1354.

(28) Doc. 47th Session, Minutes I, p. 3, para. 5.

(29) Paragraph 2 of this Article, on which the Roumanian request is based, but which however is of no direct interest at this juncture, is as follows : « It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends. » But the consequences of such a request — and this is the only point of interest here — are me by the first paragraph.

By this formula (30), the League of Nations was, in a way, given full discretionary powers. It is therefore clearly proved, particularly by the English text (which is more definite than the French text, for although according to Article 440 of the Treaty of Versailles, it has the same force but it is reality more authoritative because the English text of the so-called Wilson proposals was the original) (31) *that the Council is free to take any measures which it considers to be most appropriate in the definite circumstance before it.*

Under the cover of Article 11, the Council can act even with absolute authority (32). As stated in the report approved by a Committee of the Council on May 15th, 1927 (33) : "It is impossible to limit... the very extensive powers held by the League in virtue of its essential duty : that of taking any action effectual to safeguard the peace of nations. "

Roumania succeeded in convincing the Council. This is also clearly shown by the words spoken by Herr Stresemann at the second meeting of the 47th session (see Minutes 2, page 9) : "there might (in the event of even a partial repeal of the agrarian reform) be danger of a revolutionary movement which perhaps would not have stopped at the frontiers of Roumania. " (34).

The Council, in its capacity as guardian of the peace of the world, was competent, under the first paragraph of Article 11, to *propose* (but only to *propose*, since it is merely a mediator and conciliator) (35) any solution which in its opinion seemed the most appropriate to remedy the situation. *In proposing a solution*, and *since it did no more than make a proposal*, which was *not obligatory* for the parties in dispute, the Council acting for the good understanding between the threatened States, would not even have to limit its attention to an arbitral award, the irrevoc-

(30) Larnaude, *La S. d. N.*, 1920, p. 12

(31) Schücking-Weihberg, *Satzung des Völkerbundes*, 2nd. Edition, 1924, p. 467 ; A. Mezger, *Die Auslegung des Versailler Vertrags*, 1926, p. 45.

(32) This opinion is also shared by Redslob, *Théorie de la S. d. N.*, 1927, p. 50 ff. : "The scope of this Article is of incommensurable breadth. The functions which it assigns to the League are, so to speak, unlimited. It goes even further ; it obliges the Council to take all the measures necessary to maintain peace if war breaks out or if there is merely a danger of war in any country in the world."

See also Rousseau, l. c., 33, 34 ; Schücking-Weihberg, l. c., 468, 469.

(33) C. 169, 1927, IX, p. 1.

(34) See the impressive speech delivered by M. Titulesco, Doc. 47th Session, Minutes 2, page 2.

(35) See Gonsiorowski, II, 329.

able authority of which has been contested. As *M. Politis*, who was appointed rapporteur to the first commission of the first assembly (36), very rightly said : " Article 11 in no way confers upon the Council the right to impose a settlement of a dispute upon the parties without their consent. " But, as M. Gonsiorowski (37) points out : " It is by its moral authority that the Council imposes its decisions. "

And it can all the more impose its decision in this manner because if it were proved that there was an immediate danger of a revolutionnary movement in Roumania, and that this country had no other means of checking it, the Roumanian Government, relying on the definitely established right of necessity in international law, could even refuse to conform to the decision (38). And I concur *in every world spoken by M. Titulesco* (39) who after having stated that the Council was competent, or as we have said, free to act in this matter, concluded with the following words : "The Council, in the exercise of the exceptional jurisdiction conferred on it by Article 239 of the Treaty of Trianon, cannot fail to recognise the essential task imposed on it by Article 11. As a political body, it cannot ignore political contingencies. It must have the right to refuse to make an appointment which appears to it inexpedient and likely to affect international relations or to militate against its own satisfactory working. To deny the Council this right of judgment conferred upon it by Article 11 would be to reduce a body which is invested with the highest and most difficult political mission to the rank of a mere machine."

The considerations which led the Council to take its decisions are the same as those which seem to have prevented it from granting the Hungarian request that the question of the competence of the M. A. T. be referred to the Hague Court of Justice for an advisory opinion of the parties to the dispute, the discontent would not have diminished, since, from the *political* point of view, the question has become one of considerable importance.

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(36) Plenary meetings, page 493.
(37) L. c.
(38) STRUPP, *Das Völkerrechtliche Delikt*, 1920, p. 122, ff. ; also, by the same author, *Eléments* 228 ff.
(39) L. c., p. 3.

4) It has been asked whether the Council was not under the obligation to refer the question of competence or any other matter to the Court of International Justice at The Hague for an advisory opinion. To raise this question is equivalent to advancing a negative answer (40). Those who have made such a claim do

(40) Would a motion for obtaining an advisory opinion have required an absolute majority vote or the unanimity of the Council ? The principle established by the Covenant, Article 5, which is decisive requires — and this is the rule to be followed since (with the exception of the self-governing colonies referred to in (Article 1 of the Covenant) it is here a question of independent and equal States (see FREYTAG-LORINGHOVEN : *Satzung des Volkerbundes*, 1926, p. 20 ff.) — unanimity for "decisions" and "all matters of procedure, including the appointment of Committees to investigate particular matters may be decided by a majority of the Members represented at the meeting." The importance of the question asserts itself if we turn to Article 4, paragraph 5, which reads as follows : "Any Member of the League not represented on the Council shall be invited to send a Representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League." (Here again, the English text is clearer than the French text which says "*...à y envoyer siéger un Représentant lorsqu'une question qui l'intéresse particulièrement est portée devant le Conseil.*") This means that these Members of the League have the same rights as the other Members of the *Council*, particularly in regard to voting. Now, would it have been necessary, in this case, to obtain Roumania's consent before asking the Hague Court for an advisory opinion? Neither the discussions before the Council nor the opinions of the Court furnish a direct and absolutely conclusive reply to this question. Among the numerous authorities who have written on this matter, Mr. NAIN (British Year Book of International Law, 1926, p. 139), who has perhaps examined it in greater detail than any other, reaches the following conclusions : "The League is founded on the principle of the independence of legal equality of States, except in so far as the terms of the Covenant depart from that principle. Absolute unanimity is the general rule, and the burden of proof is upon those who assert that in any particular instance absolute unanimity is not required. It is a commonplace that treaty provisions which are restrictive of independence must be restrictively construed, and I beg leave to doubt the soundness of the view that, as it were by a side wind, States which are Members of the League have thus in substance parted with one of the most cherished rights of a State, namely, not to litigate except by its own free choice. This opinion may be regarded as revealing the cloven hoof of the theory of sovereignty, now so unpopular, but that theory cannot be regarded as obsolete. Thus in the Eastern Carelia case we find the Court saying (Publ. B. No. 5, p. 27) : 'It is well established in international law, that no State can, without its consent be compelled to submit its disputes with other States either to mediation or to arbitration or to any other kind of pacific settlement." In these circumstances, I venture with diffidence to submit the view that the Council must be absolutely unanimous in requesting the Court for an advisory opinion, except when the opinion is not "substantially equivalent to deciding the dispute between the parties" but merely relates to the procedure or method to be adopted by the Council in settling the dispute."

The passage quoted by Mr. NAIN is an extract from the opinion of the Hague Court on the Carelia case. The corresponding French text is : "*Répondre à la question équivaudrait en substance à trancher un différend entre les parties.* » Although this does not mean that the opinion is binding on the Council and that it settles the dispute, morally the Council generally accepts the conclusions reached by the Court recommended by the high authority of this world tribunal. For the case in point, the opinion would be equivalent to a decision on the question submitted to the Court.

not fully understand the rôle of the Court when giving advisory opinions to the Council of the League of Nations. Article 14 of the Covenant is quite clear on this point : " The Court may also give an advisory opinion upon any dispute or question *referred to it* by the Council or by the Assembly. "

This means that the Court is *obliged* (since in this case, it is an *organ* of the League of Nations) to give an advisory opinion IF, and only IF, the Council asks it to do so. Hence, *the Council has discretionary authority to exercise this right but in no case is it compelled to make such a request* (41).

Here again, the right conferred on the Council by Article 11 is neither limited nor diminished in any sense. Count Apponyi, the principal Hungarian Delegate, was therefore entirely mistaken when he stated before the Council (see Doc. C. 47th Session, l. c. page 10) that the Council was under the formal obligation to obtain an advisory opinion of the Permanent Court of International Justice on all questions of law; he was also wrong in protesting against the " three Geneva principles " proposed by the Committee of Three, adopted by the Council and recommended to the parties as legal rulings in the present dispute.

These three principles recall to the mind of any person familiar with the law of nations the three famous Washington principles laid down *ad hoc* by the Arbitral Tribunal at Geneva in the well-known Alabama case. They recommend themselves, as we shall see later, *because they are in conformity with positive international law.*

It has been argued on behalf of Hungary that since it was not Hungary herself but her nationals, domiciled in New Roumania who appealed to the M. A. T., it would be impossible to overlook this point. In other words, it has been claimed that,

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For this reason I think the vote should be unanimous, including the votes of the parties.

See further, HUDSON : *Advisory Opinions, Publications of the Academy of International Law at The Hague*, 1925, III, 379 ff ; also an article by the same author in the *American Journal of International Law*, 1926, p. 333 ff ; WRIGHT, l. c. 1927, 139 ff. See also for the same conclusions, reached however by different reasoning : SCHLINDLER, *Die Verbindlichkeit der Baschlüsse des Völkerbunds*, 1927, 25-29 ; BEUVE-MÉRY, *La compétence consultative de la Cour Permanente de Justice Internationale*, 1926, p. 51 ("If the opinion of the Court has been given unanimously, although this opinion is only given as advice which is not binding on the political body which has asked for it, the latter cannot, in fact, take a different decision. It is under an obligation of fact, a kind of duty "*de convenance.*"

(41) BUSTAMENTE : *The Permanent Court of International Justice*, pages 247, 348. POLITIS : *La Justice Internationale*, 1925, p. 72.

in virtue of the Treaty of Trianon, the Hungarians have acquired a *persona standi in judicio*, a personality in international law different from that of their State. Although I am an ardent advocate of the idea that it is not only States which are subject to international law (42), I cannot accept the thesis which grants subjective international rights to the nationals of States entitled to institute proceedings before the M. A. T. in their own name. When the States granted them this faculty, they did not do so with the intention of making them independent; they did so for reasons of convenience and without wishing to deprive themselves of the right to modify or even to abolish that faculty by further treaties *between each other*. This is in accordance with the old proverb : " *Salus publica summa lex esto* ". To claim as Count Apponyi did, that renunciation on the part of Hungary is impossible because the Treaty of Trianon has, indirectly, become part of the national legislation of Hungary is to disregard the relationship existing between national and international law. A new Treaty which gives rise to a new law also gives rise to a modification of the law already in force.

The foregoing observations lead to the following conclusions :

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1) *Any proposals made by the Council, relying on Article* 11 *of the Covenant, and suggested to the parties in dispute, are in accordance with that Article and are, in that respect, legal in that the Council with its sovereign powers of decision considers them suitable to bring about a settlement;*

2) *Juridically speaking, a proposal made by the Council is merely good advice — the logical consequence of its rôle of international conciliator — and is not legally binding on the parties.* For this reason, the argument advanced by Count Apponyi (*l. c.*, p. 10) in which he regards the three Geneva principles as a restriction of the liberty of the parties, finds no justification whatever, for he does not realise that these proposals are nothing more than proposals and a contractual agreement would be necessary before they could become obligatory for the parties;

(42) STRUPP, *Elements*, l. c., p. 22 ff.

3) *The existence of a* lis pendens *before an arbitral tribunal, regularly invoked by private individuals, does not preclude the Council from not availing itself of the right conferred on it by Article 239 of the Treaty of Trianon to appoint arbitrators, nor does it prevent the parties from coming to an arrangement which they themselves consider equitable.*

II.

Although we are firmly convinced that an understanding will be reached between the litigants, we nevertheless consider it our duty not to pass over the material question in silence, namely : *Was Roumania acting within her rights in applying her agrarian legislation in the territories acquired in virtue of the Treaty of Trianon?*

Without entering into all the details of the question which have been analysed for both sides by eminent authorities, we wish to state that:

1) *There is no regular international rule which precludes a State from expropriating the nationals of other States, whether against or without compensation, on the understanding that in the application of these measures there is no difference in treatment and no inequality between the nationals of the State applying them and foreigners (equality of treatment being the maximum that a foreigner can demand, in the absence of express Treaty provisions) and that measures must not be imposed, in law or in fact, on foreigners and on certain foreigners as such* (43);

2) *Even to-day, there is no uniform national legislation in force in civilised States which requires that equitable compensations must be granted to persons injured by expropriation, since modern States, such as Germany for example, have adopted texts such as Articles 153 and 155 of the German Constitution of August 11th, 1919, which provide for expropriation, in virtue simply of a Reich law, without compensation;*

(43) STRUPP, *Das völkerrechtliche Delikt*, 1920, p. 63, and particularly pp. 118, 119 (i. e., the text of p. 119 and the note on page 120) ; also the limit between *measures* of expropriation and the *régime* of expropriation in Soviet Russia. STRUPP, *Intervention in financial questions, Lectures at the Academy of International Law at The Hague*, 1925, IV, *multis locis*.

3) *If, in theory, exceptions are sometimes made in the case of a change in territorial sovereignty, this view is merely the consequence of out-of-date conceptions of natural law, which come into conflict with a positivism that disregards acquired rights, insurmountable for the legislator* (44) ;

4) *With the exception of the special cases mentioned under* 3), *such an international duty can only be the consequence of an international contractual obligation, either explicitly expressed or as the result of a clause providing for the treatment of the most favoured nation;*

5) *A measure precluded by a Convention can never be legitimate, as regards that instrument, on the ground that the State applies it also to its own nationals* (Decision of the Court of Justice, No. 7, Publications, p. c., p. 32);

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(44) *a*) So-called acquired rights are irreconcilable with the modern conception of the all-powerful legislator. The latter may, within the limits of his international obligations and of his Constitution (which, moreover, is subject to modification) take any action he pleases. And, in this case, a foreigner cannot claim à status more favourable than that of nationals.

b) The two most recent and competent authorities on the question of the Succession States, MM. SCHÖNBORN and GUGGENHEIM write as follows :

1) M. SCHÖNBORN, Staatensuccessionen, 1913, p. 53 :

"Rechtmässig erworbene Privatrechte der Einzelnen sind im Zessum unantastbar für den Zessionar — *sagt man* (°) ; in Wahrheit sind es im Regelfall genau so gut und mit genau den gleichen Einschränkungen wie im übrigen Staatsgebiet des Zessionars. Der moderne Kulturstaat respektiert im allgemeinen "wohlerworbene" Privatrechte seiner Untertanen (wie auch der Staatsfremden) überhaupt ; und viele Verfassungen sprechen diesen Grundsatz ausdrücklich aus. *Dabei ist aber die Entziehung auch solcher Privatrechte durch Akte der Gesetzgebung oder auf Grund von Enteignungsgesetzen stets vorbehalten, und das gibt auch bezüglich der in einem abgetretenen Gebiet vor der Abtretung* rechtmässig erworbenen (°)."

2) M. GUGGENHEIM, *Beiträge zur völkerrechtlichen Lehre vom Staatenwechsel*, 1925, p. 123 :

"Zweifellos entstammt das *Postulat* (°) solcher Einschränkung der dem Staat an sich zustehenden Befugnis, seine eigene Rechtsphäre selbstherrlich zu gestalten, dem Gedankenkreis des Naturrechts, das dem Individuum und der Gesellschaft unverrückbare *vorstaatliche* Rechte einräumt.

I. Nach dieser Lehre erscheint die Gesetzgebung nicht als eine materiellunggebundene. Sie knüpft an jene unverletzlichen Rechte der Individuen, welche sie nur dann aufheben darf, wenn es der staatliche ordre public erfordert."

PP. 124, 125, 126 : "*Insofern... seine Rechtsauffassung von der des Vorgängerstaates abweicht, kann der Folgestaat nicht gehindert werden, Rechte der Subjekte aufzuheben, die der Durchsetzung seiner Eigenart, hinderlich sind. Sein ordre public geht unverletzlichen Rechten der Rechtssubjekte vor ; nur darf es bei der Aufhebung jener Rechte nicht willkurlich verfahren, indem es bei einem gleichartigen Tatbestande gegenüber ihm unterworfenen Rechtssubjekten verschieden verfährt* (°). Dies würde der Idee des Rechts wiedersprechen und Willkur bedeuten.

See also pp. 126, 127.

(°) Italicised by the writer of this opinion.

6) *Article 250 of the Treaty of Trianon is not a clause of that nature, since it is obvious from its connexity with Articles 232 et seq. that it relates only to war and post-war liquidation, referred to in all the Peace Treaties of 1919-1920, imposed on nationals of the Central Powers, as such, and excluded from Article 267 of the Treaty of Saint-Germain at the request of Austria in the interest of persons subject to foreign territorial sovereignty, but also in the interest of Austria herself in view of the fact that she was unable to pay the large sums required to compensate individuals affected by liquidation. At the time of the drafting of Article 267, on which Article 250 of the Treaty of Trianon was based, no attempt was made to prevent expropriations already being carried out, for imperative social reasons* (45);

7) *It is this last point which is decisive. As already stated, it is here a question of the logical and inevitable consequences of a reform begun in 1913 and sanctioned in 1917, that is before the result of the war could be foreseen;*

8) *It is therefore wrong to compare, as M. Scelle does for example, this expropriation with that carried out or being carried out in certain new States;*

9) *This is all the more true in that the idea and conception of the Roumanian expropriation are not applied, either in law or in fact, against foreign nationals, — Hungarian nationals in this case;*

10) *Not in law, because the enactments in question made no distinction between nationals and foreigners;*

11) *Not in fact, because there is no evidence (see No. 1) that the measures were taken chiefly against foreigners or against*

(45) On liquidation, see STRUPP : *Zuständigkeit...*, 25 ff. ; FUCHS, Die Grundsätze des Versailler Vertrags über die Liquidation und Beschlagnahme deutschen Privatvermögens im Auslande, 1927, p. 25 ff., particularly p. 32. See also the well-known opinions of MM. BASDEVANT, JEZE, POLITIS, pp. 11, 12, 15 ff.

See also the decision of the Court of Justice No. 7, p. 32 : "The régime of liquidation applies to German property *as such*."

See also : SCELLE, I, l. c., and GIDEL, Decision No. 7, in the *Revue de Droit International* (*Revue de Droit international* by LAPRADELLE-POLITIS), 1927, I, 76 ff.

For the whole *status causæ et controversiæ*, see the Jurisprudence of the Mixed Arbitral Tribunals, by M. de LAPRADELLE, 1927. See also *Arch. der Friedensverträge*, II, 114 ff. See for the origin of Article 267 of the Treaty of Saint-Germain : *Bericht über die Tätigkeit der Deutsch-Oster. Friedensdelegation in Saint-Germain-en-Laye*, I, 1919, p. 186 ff.

nationals of a certain State, either openly or in a disguised manner, — facts which if proved would constitute a veritable international offence and would compel Roumania (or any other State placed in the same position) to re-establish the situation which existed before the application of the illegal measures and to pay compensation (46);

12) *Roumania cannot be blamed for the depreciation of her currency — a misfortune that overtook many other countries and from which the people of these countries suffered — until it can be proved that this depreciation did not affect all Roumanians without distinction.*

(46) See Decision No.7 (l. c.) p. 30 : "Such an abuse is not presumed, but the burden of proof is on the person making the allegation."

The case of the Hungarian optants before the Council of the League of Nations.(*)

BY

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I.

The difficulties which have arisen between the Hungarian and Roumanian Governments, the phases of which have been very numerous, led to a discussion which gave the Council of the League of Nations an opportunity of asserting, with admirable clearness and a lofty conception of the problem, the nature and scope of the powers conferred on it by the Covenant of the League of Nations which forms the preamble to all the Peace Treaties.

The origin of the dispute is familiar to all. On more than one occasion, Roumania called upon landowners to make certain sacrifices in favour of the peasants whose precarious position was a source of anxiety to the Government and who, moreover, had at various intervals resorted to acts of violence in order to show that they aspired to more favourable treatment; (reference to these incidents is necessary in order to judge of the attitude taken by the Council of the League of Nations in the conflict between the two Governments).

In May 1914, a Constituent Assembly was appointed with a view to permitting, by an amendment to the Constitution (which precluded expropriation for reasons of public welfare in favour of any persons other than the general community), expropriation of land in favour of the peasants. The war delayed the execution of the scheme but the Government mani-

(1) Article published in the *Revue Politique et Parlementaire*, No. 396, on November 10th, 1927. Translated from the French version.

fested its anxiety to bring it into operation by obtaining in 1917, that is during the height of the hostilities, the adoption of a Constitution under the terms of which the expropriated owners were to receive an annuity, the nominal capital of which, equal to the value of the expropriated land, was to be redeemed in fifty years and to bear interest at 5 %. The compensation therefore represented the actual value of the land expropriated, the national currency still being almost at gold parity.

The measure was extended to the territories allotted to Roumania after the war. In Transylvania, in particular, it was applied in virtue of the law of September 10th, 1919, which was ratified by Parliament in 1921.

The fall of the currency was naturally disastrous to the owners; it was disastrous to persons of independent means, as was the case in all the other countries whose currency depreciated. Unless the amount of the compensation paid was increased, it far from represented the value of the land at the time the annuity was actually granted.

The only claims lodged were those of the " Hungarian optants ", that is to say the owners of Hungarian nationality whose land situated in Transylvania was subjected to the acts of expropriation.

The Treaty of Trianon, like all the treaties concluded regarding the succession of the Austro-Hungarian Empire, differed from the Treaties concluded between France and the various ex-enemy Powers in that it precluded the liquidation of Hungarian property in Roumanian territory. In consequence, the Treaty of Trianon placed Hungarians domiciled in the succession States on the same footing as the nationals of those States. As will be seen later, this was the maximum of the request submitted by the Hungarian Government itself; it was obvious that, in so far as its own nationals were concerned, it feared that measures might be taken whereby this equality of status would not be recognised.

The expropriated Hungarian nationals sued the Roumanian Government before the Roumano-Hungarian Mixed Arbitral Tribunal requesting the latter to declare that the expropriation measures were contrary to Article 250 of the Treaty in that they indirectly amounted to the liquidation of property belonging to Hungarians; they further claimed the restitution of their land

and, in case this should prove to be impossible, compensation equal to the value of the land.

There is no necessity to examine whether, from the point of view of law, this claim was justified, whether it was permissible to assimilate a measure of a general nature, voted and carried out in the interests of justice and public peace, and which, by reason of the considerations which had inspired it, affected nationals, allies, neutrals and enemies without discrimination, with a measure of liquidation which consists (as in the case of all countries where it was carried out in application of the Treaties) in abolishing purely and simply the property of enemy nationals and charging its value against the compensation to be paid by their Government. It is also unnecessary to examine whether, according to the spirit of the Treaty of Trianon, enemy nationals could be recognised as holding rights more favourable than those held by owners of any other nationality, and whether, in precluding the liquidation of property belonging to Hungarians, the Treaties had not merely intended to prevent any measure which would result in Hungarians being treated less favourably than nationals. As will be pointed out below, the Hungarian Government itself expressed an opinion on this latter point.

II.

However that may be, the Mixed Arbitral Tribunal was appealed to by the Hungarian nationals.

That they had the right to do so is incontestable. It was for the Arbitral Tribunal to discover whether it was competent, that is, whether the affair came within the category of disputes for the settlement of which it had been created, especially those relating to the interpretation and application of Article 250.

Notwithstanding the conclusions of the Roumanian Government, the Tribunal declared itself competent.

The Roumanian Government then withdrew the judge whom it had appointed; it was fully entitled to do so since the treaties contain no provision which obliges a magistrate to sit and since they even provide for the same procedure as that followed in the absence of the judge representing one of the High Contracting Parties.

The Roumanian Government laid the affair before the Council of the League of Nations.

By a cross demand the Hungarian Government claimed the application of the procedure to which we have just referred, namely, that of Article 239 of the Treaty of Trianon whereby if in case there is a vacancy a Government does not proceed to appoint the judge as provided the other Governement shall choose him from the two persons nominated by the Council of the League of Nations.

In appealing to the Council, the Roumanian Government was merely relying on Article 11 of the Covenant of the League of Nations under which each Member of the League may bring to the attention of the Council any circumstance whatever affecting international relations which threatens to disturb the good understanding between nations upon which peace depends.

The Council asked the opinion of six eminent jurists of different nationality; on their unanimous opinion it took the view, also unanimously, that the two parties must conform to the definite rules contained in Sir Austen Chamberlain's report which made a definite distinction between expropriation — which is outside the competence of the Mixed Arbitral Tribunal — and liquidation, which is within its competence.

Roumania accepted the terms of this report, Hungary rejected them.

The report comes to the following conclusion : " In the event of a refusal by Hungary, the Committee considers that the Council would not be justified in appointing two deputy members in accordance with Article 239 of the Treaty of Trianon. "

III.

By thus depriving the Hungarian Government of the right to choose a judge to complete the Arbitral Tribunal and the Arbitral Tribunal itself of the possibility of pronouncing on the question, did the Council of the League of Nations misinterpret its rôle? Did it evade an obligation imposed on it by the Covenant?

The reply presents no difficulties.

The essential rôle of the League of Nations is the safeguarding of peace.

The very terms of the preamble to the Covenant declare that it was signed " in order to achieve international peace and security. "

Neither the Assembly nor the Council have any other essential mission.

" The Assembly may deal with any matter within the sphere of action of the League or affecting the peace of the world ", says Article 3.

"The Council may deal with any matter within the sphere of action of the League or affecting the peace of the world", adds Article 4.

The Council may therefore be appealed to by one or other of the High Contracting Parties in regard to questions which are serious enough to be regarded as of a nature to threaten peace.

This, moreover, clearly emerges from Articles 13 and 15 of the Covenant. According to Article 13 the Members of the League have agreed to submit to arbitration any dispute which they recognise to be suitable for settlement by arbitral award. A question cannot, therefore, be referred to arbitration without the consent of the two Governments concerned; — this, moreover, is in conformity with the most elementary principles : arbitration rests upon terms of submission, that is, upon a *contract*, which indicates the substance of the dispute and the names of the arbitrators.

Neither the Roumanian Government nor the Hungarian Government proposed arbitration when their mutual consent was necessary. Apart from arbitration there remained therefore Article 15, which lays down that " if the dispute likely to lead to a rupture " is not submitted to arbitration it shall be laid before the Council on the sole condition that one of the Governments gives notice of the dispute to the Secretary General, " who will make all necessary arrangements for a full investigation and consideration thereof. "

This is the kind of solution which would unquestionably have been reached if the Roumanian Government after having vainly pleaded incompetence had, as it might have been led to fear in view of its failure on this point, found itself in presence of an award of the Arbitral Tribunal condemning it to

make payment in gold to the expropriated Hungarian landowners. Article 15 of the Covenant in declaring that the Members of the League are not only authorised but are obliged to bring to the attention of the Council any dispute likely to lead to a rupture in no way restricts this right and this obligation in case the Arbitral Tribunal has given an award on the affair. In point of fact, the peace treaties provide that the High Contracting Parties agree to regard the awards of the Arbitral Tribunal as final which necessarily supposes, however, that the tribunal is a real tribunal, that is, that it pronounces within the limits of its competence and not outside the mandate conferred upon it. Further, however final they may be, and though limited to its competence, it is none the less possible that, in view of the feelings to which they may give rise, these awards may be of a nature to threaten peace. And then is the time for the intervention of the Council of the League of Nations since, without exception and in any circumstance the mission of that organisation is the safeguarding of peace.

It is obvious *a fortiori* that the intervention of the Council is legitimately solicited by one of the Governments between which has arisen a dispute calculated in the opinion of that Government to involve a rupture as a result of a first award of the Arbitral Tribunal, which leads it to foresee a second still more serious.

This Government justly relies on Article 4 of the Covenant, that is, on the rôle directly assigned to the Council by the Covenant. It would be absurd to maintain that for the application of Article 4 the dispute must have assumed a definite character, that it must have materially manifested itself. For the Council to take a decision it has only to recognise that peace is threatened.

And without doubt it is for the Council alone to decide finally whether peace is at stake since no authority has been set up above it to examine the justification of such decisions.

Thus, not only is it legitimate, but it is very wise that during the course of proceedings before the Arbitral Tribunal the Council of the League of Nations should intervene at the request of one of the parties, or even automatically, with a view to safeguarding peace. In this way, not only does it fulfil the mission entrusted to it by the Covenant, but it avoids the necessity of having to fulfil it later when the dispute has perhaps become embittered and its intervention less effectual.

IV

Neither does the Covenant settle the methods of procedure to be followed by the Council for the safeguarding of peace. By the very fact of its silence on this point, it leaves such methods to the discretion of the Council even as the latter determines its own procedure.

In the present case, the Council took the view that it would safeguard peace by abstaining from appointing a judge to take the place of the judge who had withdrawn. By following this line, the Council was only acting entirely within its rights.

Thus, even if the Council, under the text of the Covenant, must appoint the judges to take the place of those who have withdrawn, this obligation would be imposed upon it only subject to the fundamental mission conferred on it by the Covenant. Having as absolute rôle the safeguarding of peace and being obliged to subordinate everything to this rôle, which is the *only* one entrusted to it by the Covenant, it cannot be bound to make an appointment which might appear to be of a nature to threaten peace among nations.

Moreover, the peace treaties impose no obligation on the Council in so far as concerns the appointment of judges. They say that each of the Governments concerned shall choose one of the judges of the Mixed Arbitral Tribunal and that if it does not proceed to do so the judge shall be chosen from the persons nominated by the Council of the League of Nations. There is nothing here which indicates an obligation; it is not said that the Council *must* appoint the persons from whom the judges are to be chosen.

In a word, the Council has no obligation in this respect; and even assuming that such an obligation did exist, it would still be subject to the mission entrusted to that organ to take any decision that may be deemed wise to safeguard peace.

V

In presence of these considerations and in view of the absolute power conferred upon the Council, it might seem unnecessary to examine the reasons which led the Roumanian Government to appeal to the Council and the latter to refuse to appoint a judge to the Mixed Arbitral Tribunal.

There is however a certain interest in showing the profound wisdom underlying the attitude of the Roumanian Government and the resolution taken by the Council.

However justified may be the confidence inspired by the Mixed Arbitral Tribunal, there is no doubt that owing to its composition its awards are, in fact, often given by one judge; we cannot forget, moreover, that there is no appeal against these awards. Although there may be countries at the lowest level of the judicial evolution which have the system of a single judge, there are none which refuse all appeal against the decisions of the first judge, or which are not convinced of the necessity of entrusting the awards given by him to examination by several judges. The numerous interests without precedent which are entrusted to Arbitral Tribunals and which are not simply material interests, give rise to a certain amount of apprehension in respect of the absolute powers of the Arbitral Tribunal. If, without opposition, it is allowed to take decisions which may involve not only the wealth of private individuals, but also the stability, peace and independence of States, it is obvious that the peace treaties did not intend to confer upon it such rights. Now, such abuses would of course be justified if it were admitted that the Arbitral Tribunal is judge of its own competence and that on the request of a Government or private individual, it could therefore take upon itself to examine any questions that it liked by merely asserting that they came within the scope of those to be referred to it under the treaties. If we may count on the lofty spirit of equity by which the judges are indisputably animated, it would, in order to avoid such flagrant results, be sufficient justification for the intervention of the Council of the League of Nations for these results to be theoretically possible.

The Roumanian Government could not possibly accept an award which decided the dispute in favour of the Hungarian optants. To take back from the peasants land which had belonged to Hungarians would have given rise to insurrection. The new dispossessed owners would certainly not have submitted to worse treatment than that accorded to the peasants who had received land belonging to nationals, to Allies or to neutrals, or, more especially, to be deprived of their property in favour of ex-enemy subjects; to compensate the Hungarian optants in gold was a possibility which could not be contemplated without

giving rise to a certain amount of ridicule, for even assuming that the resources of the country would allow of such compensation, it is impossible to imagine that the Roumanian people would agree to new taxes to furnish enemy subjects with compensation which had not been granted to Roumanian landowners, nor that the latter would agree to such inequality of treatment, aggravated in their case by the share of the new charges introduced with a view to paying the optants which they would be called upon to assume.

The Roumanian Government could obviously only refuse to apply the award which might have been given against it by the Arbitral Tribunal. Article 15 of the Covenant would thus have come into play.

That Government, and the Council with it, considered it wiser to avert any kind of conflict, from the first decision. The situation would certainly have been more delicate after a decision giving the victory to the optants; the Roumanian Government would have been accused of consenting to defend itself on the substance of the question after unsuccessfully pleading incompetence, of showing thus that it had hoped to obtain a favourable decision and of evading the execution of a sentence which, if it had been in its favour, it would have accepted.

Moreover, if ever a sentence given on competence was calculated to prejudice the substance of the question, it was that which dismayed the Roumanian Government. No doubt the Arbitral Tribunal did not directly take a decision as to whether the dispossession of the Hungarian optants was, or was not, liquidation as prohibited by the Treaty of Trianon; it merely stated, to justify its competence that its mission is to give judgment on any case of expropriation of Hungarian property and it reserved for the substance of the question the point as to whether, *de facto*, the expropriation was the consequence of the agrarian reform and whether, *de jure*, the compensation was adequate. As soon, however, as the Tribunal declared itself competent under the very provision of the Treaty which forbade the liquidation of Hungarian property, it was permissible to suppose that it considered the measure to be one of liquidation; which must necessarily lead it to consider that the agrarian reform could not apply to the Hungarian optants. And this prejudice resulting from the declaration of the competence of the Tribunal was

another reason why the Roumanian Government, if it had continued the suit after this sentence, might have incurred the reproach of having accepted in advance a final award which it could not have failed to foresee.

VI

In submitting the question to the Council of the League of Nations, it made use of its right under Article 11, paragraph 2, of the Covenant to call the attention of the Council to what seemed to it a circumstance " affecting international relations " which threatened "to disturb international peace or the good understanding between nations on which peace depends ". The Council considered, in its sovereignty, that the case was one of those in which, according to the first paragraph of the same article, it " shall take any action that may be deemed wise and effectual to safeguard the peace of nations." The measure taken was thus legitimate.

Moreover it was in harmony with the concern which the Council had shown some years before with regard to the possible consequences of the difference of opinion existing between the two governments; for as early as July 5th, 1923, it recommended that both governments should " do their utmost to prevent the question of Hungarian optants from becoming a disturbing influence in the relations between the two countries ", and, in particular, that the Hungarian Government should " do its best to reassure its nationals."

Thus the Council strictly applied the texts which determine its attributions, or rather its sole attribution. It exercised its right, in making it impossible for the Arbitral Tribunal to judge the substance of the question, and it fulfilled its duty, since Article 11 recommends it as a duty to take any action that may be deemed wise and effectual to safeguard peace, and since, some years ago, it had already shown that it realised the disturbances which might arise out of the question of the optants.

The Committee of the Council took care, moreover, to interpret its mission in the widest sense, by approving, on March 15th, 1927, a report prior to the dispute in question : "It is " impossible to circumscribe by resolutions, recommendations " or expressed wishes the very extensive rights arising for the " League out of its essential duty : effectually to safeguard the

" peace of nations..... If there is no threat of war but some " circumstance threatens to disturb the good understanding " between nations on which peace depends, this circumstance " may be brought to the attention of the Assembly or the " Council by any Member of the League, so as to enable the " Assembly or the Council to consider what should be done to " restore this good understanding between nations. " (*Official Journal of the League of Nations*, No. of July 7th, 1927, p. 832.)

If when exercising its mission, the Council of the League of Nations were to go so far as to ignore a decision given in final instance by a jurisdiction of any kind, particularly by a Mixed Arbitral Tribunal, there can be no hesitation in thinking that it would be acting entirely within its rights, since, as we have shown above, the Covenant places above everything the task of safeguarding peace, entrusted to the League of Nations.

But the Council did not go to such lengths; it did not set aside the decision by which the Mixed Arbitral Tribunal declared itself competent. In other words, it did not declare that the Mixed Arbitral Tribunal was mistaken in proclaiming its own competence; it cannot be denied that it had doubts as to the justification for this decision, but in any case it did not annul the sentence. In other words, it gave no award.

The Council cannot therefore be reproached with having disregarded the authority of international justice, by substituting its own decision for that of the Arbitral Tribunal. It would even have had the right to treat the latter as negligible, if the duty imposed on it by the Covenant had seemed to indicate this course.

VII

Nor can it be reproached with not having obtained a sufficient number of opinions to convince it that it was giving a just decision.

When it stipulates that all questions of procedure which come up at the meetings of the Council must be settled by the Council itself, Article 5 of the Covenant of the League of Nations obviously leaves the Council free to obtain any advice which it may think fit to seek, but in no case does it oblige it to ask for an opinion. Article 14, in entrusting the Council with the task of preparing the organisation of the Permanent Court of

International Justice defines this liberty of the Council, especially as regards recourse to the opinion of the Permanent Court, for it says that apart from its competence on disputes of an international character which the parties thereto submit to it, the Court shall also give an advisory opinion on any dispute or question referred to it by the Council or by the Assembly.

Consequently, the Council has to decide on its own sovereign authority whether the opinion of the Court must be asked; in any case it is under no obligation on this point.

The indications of the Covenant have been faithfully followed by the report quoted above, which contains the sentence : " If the Council deems it necessary for the accomplishment of its task, it may, in certain appropriate cases, ask the Permanent Court for an advisory opinion, or owing to particular circumstances obtain the opinion of a Commission of jurists appointed by it. "

Here again, therefore, the Council is entirely free. It may decide without obtaining any advisory opinion, if it thinks fit to obtain guidance, it does so by the appropriate measures, and, in particular, it considers whether it is necessary to have recourse to the Permanent Court. It is understandable, moreover, that recourse to this high jurisdiction could not have been declared obligatory without the risk of ruining the very institution of the League of Nations; for there is no doubt that cases might arise in which any delay resulting from the necessity of obtaining an outside opinion would be fatal. It may not have been on account of such a fear that the Council of the League of Nations, in the dispute between Hungary and Roumania, abstained from asking the opinion of the Permanent Court, but the argument none the less serves to show that, had those who drafted the Covenant insisted upon recourse to the opinion of the Permanent Court, they would have been guilty of an absurdity.

The Council, which might have given its decision *without reference to anyone*, considered that the question submitted to it touched upon delicate juridical points; it appointed jurists whose unanimous opinion added to the moral force of its decision. It is difficult to see what more it could have done.

Perhaps also the Council thought that past circumstances—*viz.* the attitude of Hungary herself—did not make it expedient to consult the Permanent Court. It would have been not only

useless but contradictory to have recourse to it. At the Peace Conference Hungary herself demanded, as the maximum of guarantee, the treatment accorded by the Succession States of the Austro-Hungarian Empire to their own nationals. In its letter of August 13th, 1919, the "Commission of the New States" declared that the property of the Hungarian optants should remain, *without prejudice of any kind, under the regime of the national law*, and that the insertion of an additional clause to this effect was unnecessary.

To ask the Hague Court whether the Hungarians were entitle to preferential treatment, in virtue of Article 250 of the Treaty of Trianon, would imply asking this high juridiction a question to which Hungary had replied in advance to the Hague Court, or else that it is meant to state that the treaties have granted that country more than she herself asked on behalf of her nationals.

VIII

It is certain, in short, that, in this dispute, which was destined to become celebrated, the Council of the League of Nations acted within the limits of its rights, which were intentionally made very extensive; that it fulfilled its rôle in taking charge of a dispute which threatened to become a cause of disturbance, misunderstanding and perhaps of conflict; that it took a sane view of the facts and was right in manifesting its conviction that nothing can restrict its mission of dealing "with any matter affecting the peace of the world," "by the maintenance", as the preamble to the Covenant expresses it, "of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another."

It may be presumed that on this score its decision will often be invoked in years to come as a happy precedent.

SUMMARY

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